TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1954

No. [redacted] 53

UNITED STATES OF AMERICA, APPELLANT,

vs.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., INTERNATIONAL BOXING CLUB, MADISON SQUARE GARDEN CORPORATION, JAMES D. NORRIS AND ARTHUR M. WIRTZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED APRIL 27, 1954

PROBABLE JURISDICTION NOTED MAY 24, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 729

UNITED STATES OF AMERICA, APPELLANT,

vs.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., INTERNATIONAL BOXING CLUB, MADISON SQUARE GARDEN CORPORATION, JAMES D. NORRIS AND ARTHUR M. WIRTZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

1 [File endorsement omitted.]

In the United States District Court, Southern District of New York

Civil Action No. 74-81

UNITED STATES OF AMERICA, PLAINTIFF,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., A CORPORATION OF NEW YORK; INTERNATIONAL BOXING CLUB, A CORPORATION OF ILLINOIS; MADISON SQUARE GARDEN CORPORATION, A CORPORATION OF NEW YORK; JAMES D. NORRIS; AND ARTHUR M. WIRTZ, DEFENDANTS

COMPLAINT—Filed March 17, 1952

The United States of America, plaintiff, by its attorneys acting under the direction of the Attorney General of the United States, brings this action against the defendants and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890 (c. 647, 26 Stat. 209, 15 U.S.C., Sec. 4) as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, to prevent and restrain continuing violations by them, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act.

2. The corporate defendants, the International Boxing Club of New York, Inc. and the adison Square Garden Corporation, maintain offices, transact business and are found within the Southern District of New York.

2 II

THE DEFENDANTS

3. International Boxing Club of New York, Inc., a corporation organized and existing under the laws of the State of New York (hereinafter referred to as "IBC (N.Y.)"), is made a defendant herein. IBC (N.Y.) maintains its offices and its principal place of business in New York City. It is engaged, among other things, in the promotion and exhibition of professional boxing contests.

4. International Boxing Club, a corporation organized and existing under the laws of the State of Illinois (hereinafter referred to as "IBC (Ill.)"), is made a defendant herein. IBC (Ill.) maintains its offices and principal place of business at Chicago, Illinois.

It is engaged, among other things, in the promotion and exhibition of professional boxing contests.

5. The Madison Square Garden Corporation (hereinafter referred to as the "Garden"), is made a defendant herein. The Garden is a corporation organized and existing under the laws of the State of New York, with its offices and principal place of business at New York City. It is engaged, among other things, in the maintenance and operation of the Madison Square Garden, the foremost sports arena in New York City, utilized for all major indoor sports including professional boxing, with a seating capacity in excess of 18,000.

6. James D. Norris, a resident of New York City, is hereby made a defendant herein.

7. Arthur M. Wirtz, a resident of Chicago, Illinois, is hereby made a defendant herein.

8. Defendants Norris, Wirtz and the Garden, respectively, are associated with, or own stock in, or hold office in the defendants IBC (N.Y.) and IBC (Ill.), as follows:

3

Deft.	Garden	IBC (N. Y.)	IBC (Ill.)
Norris	Director	President, Director and owner of 20% of outstanding shares of Class A common stock	President, Director and owner of 20% of outstanding shares of Class A common stock and of 40% of outstanding shares of Class B common stock
Wirtz	Director	Director and owner of 20% of outstanding shares of Class A common stock	Director and owner of 20% of outstanding shares of Class A common stock and of 40% of outstanding shares of Class B common stock
Garden	—	Owner of 40% of outstanding shares of Class A common stock and of 80% of outstanding shares of Class B common stock	Owner of 40% of outstanding shares of Class A common stock

In addition to the stockholdings in IBC (N.Y.) and IBC (Ill.) described above in this paragraph, 20% of the outstanding shares of Class A common stock and 20% of the outstanding shares of Class B common stock of each corporation is owned by Truman K. Gibson, Jr. and Theodore R. Jones as trustees for Joe Louis Barrow (hereinafter called "Joe Louis").

9. IBC (N.Y.) has issued 1,000 shares of Class A stock and 100 shares of Class B stock with all shares having a par value of $1.00

per share and entitled to one vote per share. Its certificate of incorporation, as amended, provides as follows:

> No dividends shall be declared or paid with respect to any share of the Class A stock unless there shall have been previously or contemporaneously declared and paid, or declared and set aside for payment, in the same fiscal year, the sum of $100.00 per share with respect to each outstanding share of Class B Stock for each $1.00 per share of dividend declared or paid with respect to the Class A Stock in said fiscal year, it being the intention that dividends shall be payable at the rate of $100.00 per share with respect to the Class B Stock for each $1.00 per share paid with respect to the Class A Stock.

4 The same provision exists in the certificate of incorporation, as amended, of IBC (Ill.) which has issued the same number of shares of stock as IBC (N.Y.).

III

Nature of Trade and Commerce Involved

10. Boxers usually compete in amateur tournaments as a preliminary to becoming professionals. As amateurs they receive no pay and box under the sponsorship of local independent boxing clubs, associations or other organizations. When they become professionals, they contract to box an opponent on a per bout basis for local promoters and receive a fee. If their skill as professional boxers results in an increasing willingness of the public to pay to view their contests, they can demand higher fees and a greater percentage of receipts from the sale of tickets and other rights. If their skill increases, they engage in preliminary and other bouts throughout the United States and eventually participate in major bouts. The fee for a major bout is usually a sum guaranteed by the promoter or a predetermined percentage of the net receipts from the sale of tickets and motion picture, radio and television rights.

11. The most lucrative asset to a professional boxer is recognition and designation by the various state athletic commissions and others as "world champion" in the division in which he competes. These divisions are:

flyweight	112 lbs.
bantamweight	118 "
featherweight	126 "
lightweight	135 "
welterweight	147 "
middleweight	160 "
light heavyweight	175 "
heavyweight	All above 175 lbs.

A "world champion" gains his title by defeating the existing champion or by eliminating all contenders, and remains world
5 champion in his division until he is, in turn, defeated by a contender or resigns the title. Such a title affords to its holder financial returns from personal appearances and exhibitions throughout the United States, from endorsements and other activities, as well as a greater percentage of the receipts from his bouts. The promotion of professional championship boxing contests is also more lucrative than the promotion of other boxing contests.

12. Of the various "world champions," the heavyweight division is the most important to boxers and promoters, as it returns the greatest financial benefits. The flyweight and bantamweight divisions are not of substantial importance in the United States because very few American boxers are of such light weights. No championship contest has been held in the flyweight division in the United States since 1935; none in the bantamweight division since 1947.

13. The promotion of professional championship boxing contests, in which the winners achieve "world champion" titles, includes negotiating and executing contracts with boxers for the main and preliminary bouts, arranging and maintaining training quarters, leasing suitable arenas, such as stadia or ball parks where substantial numbers of the public may be seated to view the contest, negotiating and executing contracts for the employment of matchmakers, advertising agencies, press agents, seconds, referees, judges, announcers and other personnel; organizing, assembling, and arranging other details necessary to the exhibition of the contests; selling tickets and rights to make motion pictures of the contests and to distribute them throughout the United States and in foreign countries; and selling rights to transmit the contests by radio or television throughout the United States and foreign countries.

14. Promoters of professional championship boxing con-
6 tests make a substantial utilization of the channels of interstate trade and commerce to:

(a) negotiate contracts with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than those in which the promoters reside;

(b) arrange and maintain training quarters in states other than those in which the promoters reside;

(c) lease suitable arenas, and arrange other details for boxing contests, particularly when the contests are held in states other than those in which the promoters reside;

(d) sell tickets to contests across state lines;

(e) negotiate for the sale of and sell rights to make and distribute motion pictures of boxing contests to the 18,000 theatres in the United States;

(f) negotiate for the sale of and sell rights to broadcast and telecast boxing contests to homes through more than 3,000 radio stations and 100 television stations in the United States; and

(g) negotiate for the sale of and sell rights to telecast boxing contests to some 200 motion picture theatres in various states of the United States for display by large-screen television.

15. Motion picture films of professional championship boxing contests are distributed and exhibited in theatres throughout the United States and in foreign countries. Similarly, radio and television broadcasts of such contests are transmitted throughout the United States and radio broadcasts of them are also transmitted to foreign countries.

7 16. The 21 major professional championship boxing contests promoted in the United States since June 1949 have produced a gross income from admissions and the sale of motion picture, radio and television rights of approximately $4,500,000.00. The total such gross income for all professional boxing contests in the United States during this period, including the championship contests, has been approximately $15,000,000.00.

IV

Offenses Charged

17. Beginning in or about January 1949, the exact date being unknown to the plaintiff, and continuously thereafter up to and including the date of the filing of this complaint, the defendants have been and now are engaged in an unlawful combination and conspiracy in unreasonable restraint of and to monopolize the above described interstate and foreign trade and commerce in the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests in the United States, and have monopolized said trade and commerce, in violation of Sections 1 and 2 of the Sherman Act. The defendants threaten to continue such offenses and will continue them unless the relief hereinafter prayed for in this complaint is granted.

18. The aforesaid combination and conspiracy, which has resulted in the said monopolization, has consisted of a continuing agreement and concert of action among the defendants to exclude others from the promotion and exhibition of and the sale of radio, television and motion picture rights in professional championship boxing contests in the United States.

19. To effectuate said offenses, the defendants have done those things which they combined and conspired to do, including in part

the acts, means, methods, contracts, agreements and understandings hereinafter more fully set forth and described.

8 20. In or about January 1949 these defendants entered into understandings and agreements among themselves and with Joe Louis, then heavyweight champion of the world, under the terms of which Joe Louis agreed to retire from active boxing, resign the title of heavyweight champion of the world, procure the exclusive rights to the services of the four leading contenders for the heavyweight title in a series of elimination contests which would result in the recognition of a new heavyweight champion of the world, and assign these exclusive rights to defendants. The understandings and agreements also provided that Joe Louis was to receive $150,000 from these defendants and was to receive stock in the corporations which were to be formed by these defendants.

21. Contracts were entered into between Joe Louis Enterprises, Inc. (hereinafter referred to as "Enterprises"), an Illinois corporation in which Joe Louis owned the majority stock interest, and Joe Walcott, Ezzard Charles, Lee Savold and Gus Lesnevich, the then leading contenders for Louis' heavyweight title, on or about February 14, 1949. These contracts provided, among other things, that the exclusive services of Walcott, Charles, Savold and Lesnevich were to be rendered to Enterprises or its assignee and that an elimination professional contest was to be conducted among them for the heavyweight championship of the world in contests staged in the United States or elsewhere throughout the world. The contracts also provided that Enterprises, or any party or corporation designated by it, was to have the exclusive right to broadcast any of the contests, both in radio and television, and the exclusive right to arrange for the production and distribution of motion picture films of said contests.

22. Thereafter Joe Louis resigned his title as heavyweight champion of the world and, through agreements and understandings entered into among the defendants and with others, there were formed the defendant corporations IBC (N.Y.) and IBC (Ill.).

9 The contracts referred to in paragraph 21 of this complaint were assigned to the defendant IBC (Ill.); $150,000 was paid to Joe Louis; and the elimination heavyweight championship contests were promoted by the defendants.

23. About May 27, 1949 IBC (N.Y.) acquired and eliminated the leading competing promoter of championship matches, Tournament of Champions, Inc. (hereinafter referred to as "Champions"), a corporation organized in the State of New Jersey qualified to do business in New York, and the owner of all issued and outstanding stock of Sporting Events, Inc., a corporation of the State of New York licensed to promote boxing contests in the State of New York. Champions and Sporting Events, Inc. had been engaged in the pro-

motion of professional championship boxing. By said purchase the defendants, through IBC (N.Y.), acquired the following:

(a) An exclusive lease dated March 15, 1949, to promote professional boxing at the Polo Grounds, New York City, which was secured by a deposit of $50,000;

(b) A contract between Champions and Marcel Cerdan to engage in a world's championship middleweight bout with Tony Zale;

(c) A similar contract with Tony Zale to engage in such a bout;

(d) A contract with Ray Robinson dated April 1949 fixing a match with Kid Gavilan for the world's welterweight championship.

24. At the time IBC (N.Y.) was formed, the defendants, through leases, agreements, understandings, and through stock ownership in corporations, possessed the exclusive right to promote professional boxing contests at the following arenas, which except for Yankee Stadium in New York City, are the principal arenas where professional championship boxing contests can successfully be presented:

Polo Grounds	New York
Madison Square Garden	New York
St. Nicholas Arena	New York
Chicago Stadium	Chicago
Detroit Olympia	Detroit
St. Louis Arena	St. Louis

25. On July 15, 1949, IBC (N.Y.) acquired the exclusive right to promote professional boxing contests in the Yankee Stadium, and extended its exclusive rights to the Polo Grounds until December 31, 1952.

26. The defendants, after the formation of IBC (N.Y.) and IBC (Ill.), promoted professional championship boxing contests through these corporations in all weight divisions except the bantam weight and flyweight. In the promotion of each such contest, the contender for the title was required, as a condition of being afforded an opportunity to acquire the title, to agree with the promoter (either IBC (N.Y.) or IBC (Ill.), among other things, that:

(a) Should he be declared the winner and gain the title, he would, for a period of three years (or five years in some cases), commencing from the time he was declared the winner, render his services as a professional boxer in title contests exclusively to the defendant promoter, and would engage in title contests

only under its promotion or that of a party or corporation designated by it, or with which it is or may be affiliated;

(b) Should he lose his title before the expiration of the three years, he agreed to box at least twice thereafter for the defendant promoter, or its designees; and

(c) Should he win the title, he would engage in a return title contest with the deposed champion within 90 days under the promotion of the defendant promoter or its designee.

27. The defendants, through IBC (N.Y.) and IBC (Ill.), have promoted or participated in the promotion of all but two of the 21 professional championship boxing contests held in the United States since June 1949.

11

V

Effects

28. The aforesaid combination and conspiracy, and monopolization has had the following effects:

(a) Promoters of boxing contests, other than defendants, have been almost entirely excluded from engaging in the business of promoting professional championship boxing contests except with the consent of defendants;

(b) Boxers have been denied a chance to compete for world championships except under conditions that prevented them, if they won, from securing the benefits of competition among promoters desiring their services to present professional championship boxing contests; and

(c) The benefits of competition among promoters of professional championship boxing contests have been denied to:

(1) manufacturers and distributors of motion pictures of such contests;

(2) radio and television broadcasters and stations;

(3) the public attending such contests, seeing them in motion pictures or television, or hearing them by radio;

(4) the owners of arenas other than those owned by defendants.

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendants and each of them have combined and conspired to restrain and to monopolize, and have restrained and monopolized, interstate and foreign

trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act, and that defendants be enjoined and restrained from continuing such violations or committing other violations of like character or effect.

12 2. That the Court adjudge and decree that the defendants have used the agreements referred to in paragraph 26 of this complaint and their financial and contractual interests in and control over arenas and organizations engaged in the promotion of professional championship boxing contests, as hereinabove described, unlawfully in instituting, effectuating and maintaining the aforesaid violations of Sections 1 and 2 of the Sherman Act.

3. That the Court order and direct the cancellation and termination of the agreements referred to in paragraph 26 of this complaint, and that the defendants be enjoined and restrained from enforcing such agreements and from entering into any agreements of like character or effect.

4. That defendant Garden be enjoined from leasing its arena exclusively for professional championship boxing contests to any promoter of such contests, and from discriminating against any promoter desiring to lease said arena for a professional championship boxing contest.

5. That defendants Norris and Wirtz be ordered and directed to cause the arenas listed in paragraph 24 of this complaint, as long as any of such arenas are controlled by these defendants, directly or indirectly, to refrain from leasing their facilities exclusively for professional championship boxing contests to any promoter of such contests, and to refrain from discriminating against any promoter desiring to lease any of such facilities for a professional championship boxing contest.

6. That the Court enter such further orders regarding the aforesaid interests in and control over arenas and organizations engaged in the promotion of professional championship boxing contests as may be necessary and appropriate in order to dissipate the effects of the violations alleged herein and to restore free and open competition in the trade and commerce in the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests.

1. That pursuant to Section 5 of the Sherman Act, an order be be made and entered herein requiring such of the defendants
13 as are not within this District to be brought before the Court in this proceeding as parties defendant, and directing the Marshals of the Districts in which they severally reside or are found to serve the summons upon them.

2. That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem just and proper in the premises.

9. That the plaintiff recover its taxable costs.

Dated: New York, N. Y. March 17, 1952.

(S.) J. HOWARD MCGRATH,
Attorney General.

(S.) H. G. MORRISON,
Assistant Attorney General.

(S.) MYLES J. LANE,
United States Attorney.

(S.) MELVILLE C. WILLIAMS,
per HL.

(S.) HAROLD LASSER,
Special Assistants to the Attorney General.

(S.) HAROLD J. MCAULEY,
Trial Attorney.
per HL.

14 In the United States District Court
Southern District of New York

[Title omitted]

Notice of motion to dismiss and granting thereof—filed January 15, 1954.

SIRS:

PLEASE TAKE NOTICE that upon the summons and complaint, heretofore filed herein, the undersigned will move this Court, at a Stated Term thereof for the hearing of motions, to be held in and for the Southern District of New York, in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 22nd day of December, 1953, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein pursuant to Rule 12(b) of the Federal Rules of Civil Procedure—

(1) for lack of jurisdiction over the subject matter;

(2) for failure to state a claim upon which relief can be granted; and

15-16 (3) for such other, further and different relief as to the Court may seem just and proper.

Dated, New York, N. Y. December 2, 1953.

Yours etc.,

SIMPSON THACHER & BARTLETT,
By BENJAMIN C. MILNER,
a Partner.
Office and Post Office Address,
120 Broadway,
New York 5, N. Y.
Attorneys for Defendants, International Boxing Club of New York, Inc., and Madison Square Garden Corporation.

PEABODY, WESTBROOK, WATSON and STEPHENSON,
By CHARLES H. WATSON,
a Partner.
10 South LaSalle Street,
Chicago, Illinois.

REID & PRIEST,
By RALPH M. MCDERMID,
a Partner.
2 Rector Street,
New York 6, N. Y.
Attorneys for Defendants, International Boxing Club, Inc., an Illinois corporation, James D. Norris and Arthur M. Wirtz.

TO:

STANLEY N. BARNES, Esq.,
Assistant Attorney General,
RICHARD B. O'DONNELL, Esq.,
HAROLD LASSER, Esq.,
Special Assistants to the Attorney General,
Room 235, U. S. Court House,
Foley Square,
New York 7, N. Y.
Attorneys for the Plaintiff.

17 Noonan, J. Motion Cal. No 63. Date: 2-4-54. Argued before Noonan, J. On 2-4-54. Granted. Settle order on notice.

(S.) GREGORY F. NOONAN,
United States District Judge.

18 [File endorsement omitted]

In the United States District Court, Southern District of New York

[Title omitted]

STIPULATION AMENDING COMPLAINT AND ORDER THEREON—January 7, 1954

It is hereby stipulated and agreed by and between the undersigned:

1. That the plaintiff may and hereby does amend its complaint filed March 17, 1952, by adding thereto a paragraph 16(a) which alleges:

> "16(a) A promoter of a professional championship fight usually derives substantially all of his revenue from two sources: (a) the sale of tickets of admission and (b) sale of rights to telecast, broadcast and produce and distribute motion pictures of the fight. In such fights, sale of television, radio and motion picture rights account for a substantial proportion of the promoter's total revenue. Since 1949 sale of these rights has represented, on the average, over 25% of the total revenue derived from championship fights, and has exceeded, in some instances, the revenue received from sale of tickets of admission. With the progressive and continuing expansion of television facilities, the proportion of the promoter's total revenue derived from television, radio and motion pictures, has been on an ascending curve, in relation to revenue derived from sale of tickets of admission. In the Marciano-Wolcott heavyweight championship fight of May 15, 1953, at Chicago, Illinois, promoted by defendants IBC (N.Y.), IBC (Ill.), James D. Norris and Arthur M. Wirtz, the promoters' receipts from sale of tickets of admission were, after federal admission taxes, $253,462.37, while their television, radio and motion picture revenue was approximately $300,000."

19-20 2. That the complaint filed March 17, 1952, as so amended, shall be referred to hereafter as the "amended complaint";

3. That the defendants' pending motion to dismiss for lack of jurisdiction of the subject matter and for failure to state a claim upon which relief can be granted, and their memorandum submitted in support thereof, shall be deemed to have been made to the said amended complaint without any necessity for renewing or amending said motion or resubmitting such memorandum; and

4. That the consent of the defendants to the amendment of the complaint by the addition of said paragraph 16(a), and their failure

to plead to the allegations contained in said paragraph, shall not be deemed to be admissions by them of the truth, materiality or relevance of said allegations, and, if so advised, the defendants may serve amended answers to the amended complaint at any time prior to the expiration of the twentieth day after the final determination of the pending motion, including any appellate proceedings involving such motion.

Dated New York, N. Y., January 7, 1954.

HAROLD LASSER,
Attorney for Plaintiff.

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendants, International Boxing Club of New York, Inc., and Madison Square Garden Corporation.

PEABODY, WESTBROOK, WATSON & STEPHENSON,
REID & PRIEST,
Attorneys for Defendants, International Boxing Club, Inc., an Illinois Corporation, James D. Norris and Arthur M. Wirtz.

So Ordered: 1/7/54.
——— J. RYAN,
U. S. D. J.

21 [File endorsement omitted]

In United States District Court, Southern District of New York

UNITED STATES OF AMERICA, PLAINTIFF,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., A CORPORATION OF NEW YORK; INTERNATIONAL BOXING CLUB, A CORPORATION OF ILLINOIS; MADISON SQUARE GARDEN CORPORATION OF NEW YORK; JAMES D. NORRIS; AND ARTHUR M. WIRTZ, DEFENDANTS.

ORDER DISMISSING COMPLAINT—February 8, 1954

At New York, New York in said District on February 8th, 1954.

Defendants having moved this Court, by notice of motion dated December 2, 1953, to dismiss this action for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, and said motion having regularly come on to be heard on February 4, 1954,

Now, on reading and filing the summons and complaint and the Marshal's return herein, the stipulation dated January 7, 1954

amending the complaint herein, the notice of motion dated December 2, 1953, and after hearing Messrs. Simpson, Thacher & Bartlett (Whitney North Seymour, Esq., of counsel) and Messrs. Peabody, Westbrook, Watson & Stephenson (Charles H. Watson, Esq., of counsel) for the defendants in support of said motion, and Harold Lasser, Esq., of counsel for plaintiff, in opposition thereto, and it appearing to the Court that it lacks jurisdiction of the subject
22-23 matter of this action and that the complaint herein, as amended, fails to state a claim upon which relief can be granted, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendants' motion be and the same hereby is granted in all respects, and it is further

ORDERED, ADJUDGED AND DECREED that the complaint herein be and it hereby is dismissed.

GREGORY S. NOONAN,
U. S. D. J.

24 In United States District Court

[Title omitted]

DOCKET ENTRIES

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Mar. 17–52	Filed complaint and issued original and additional summons.		
Apr. 8–52	Filed stip & order extending time of defts. International Boxing Club of N. Y. Inc. and Madison Squ. Garden Corp. to answer to 5–8–52—Noonan J.		
Apr. 9–52	Filed stip & order extending time to answer to 5–8–52.		
Apr. 11–52	Filed copy of complaint.		
Apr. 11–52	Filed copy of complaint.		
Apr. 11–52	Filed summons & return, served Edwin Lee, Treas. Madison Sq. Gard. Corp.; 3–19–52; and for International Boxing Club of N. Y. 3–19–52; Harry Markson for James D. Norris, 4–8–52.		
Apr. 17–52	Filed add. summons & return, served Truman Gibson Secy to Int. Box. Club 3–21–52; unable to find Arthur Wirtz.		
May 7–52	Filed stip. & order extending time of defts. Internat'l Boxing, et al to answer to 6–9–52—Weinfeld, J.		
June 9–52	Filed answer of deft. International Boxing Club of N. Y.		ST&B
June 9–52	Filed answer of deft. Madison Square Garden Corp.		ST&B
25			
June 9–52	Filed answer of defts James D. Norris & Arthur M. Wirtz.		R&P
June 9–52	Filed answer of deft Internat'l Boxing Club, Inc. (Illinois Corp.).		R&P
June 26–52	Filed note of issue for trial.		

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Apr. 28-53	Filed affdvt & notice of motion for preference—Memo endorsed 4-24-53—Set case head Trial Cal. for 12-7-53—Knox, Ch. J.	x	
Apr. 28-53	Filed supporting affdvt.	x	
Apr. 28-53	Filed opposing affdvt.		x
Sept. 25-53	Filed notice of taking depositions.	x	
Oct. 8-53	Filed affdvt & notice of motion to reset dates of pretrial conference & trial—Pretrial reset for 1-11-54. Trial re-set foot of Day Cal. for Jan. 1954, etc.—Knox, Ch. J.		
Oct. 8-53	Filed opposing affdvt.		x
Oct. 8-53	Filed stip. resetting dates of first pretrial conference, etc.		
Jan. 8-54	Filed stip. & order amending complaint—Ryan, J.		
Jan. 12-54	Filed stip. & order adjourning pretrial without date and marking case off calendar subject, etc.—Knox, Ch. J.		
Jan. 15-54	Filed notice of motion re: to dismiss. Ret. 12/22/53.		
Jan. 16-54	Filed stip. & order adjourning notice of motion to 2/2/54. Ryan, J.		
Feb. 4-54	Memo endorsed on motion filed 1-15-54—Granted—Settle order on notice—Noonan, J.		
Feb. 8-54	Filed order dismissing complaint—Noonan, J.—Mailed notice of entry 2-9-54.		
Mar. 12-54	Filed Petn. for appeal. Order allowing appeal to U. S. Sup. Court (Noonan, J.) USA. Mailed Notice of Entry 3-16-54.		
Mar. 12-54	Filed Citation, USA.		
Mar. 12-54	Filed Statement Rule 12(3); Assignment of Errors; Praecipe; Statement as to Jurisdiction USA.		
Mar. 12-54	Filed Proof of Service (of above papers on appeal).		
Mar. 19-54	Filed affdvt & notice of motion to strike items 2 & 3 from praecipe, etc.—ret. 3-25-54.		
Mar. 26-54	Filed motion addressed to Supreme Court, US, to affirm judgment of District Court.		
Apr. 8-54	Memo endorsed on motion filed 3-19-54—Referred to Noonan, J.—I. R. Kaufman, J.		
Apr. 21-54	Filed stip. & order extending time to file appeal record to 5-6-54—Noonan, J.		
Apr. 23-54	Filed Opinion #21071. Motion to strike portions of praecipe granted—So ordered. Noonan, J.—Mailed notice of entry 4-23-54.		

26 Clerk's Certificate to foregoing paper omitted in printing.

27 In the United States District Court for the Southern District of New York

[Title omitted]

PETITION FOR APPEAL—Filed March 12, 1954

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final decree of this Court entered on the eighth day of February, 1954, does hereby pray an

appeal from said final decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

STANLEY N. BARNES,
Assistant Attorney General.

HAROLD LASSER,
Special Assistant to the Attorney General.

Dated this 12th day of March, 1954.

28-30 [File endorsement omitted]

In the United States District Court for the Southern District of New York

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 12, 1954

In the above-entitled cause, the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered on the eighth day of February, 1954, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

GREGORY F. NOONAN,
United States District Judge.

Dated this 12th day March, 1954.

31-33 Citation in usual form showing service on Simpson, Thacher & Bartlett, et al., omitted in printing.

34 In the United States District Court
For the Southern District of New York

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed March 12, 1954

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the district court on February 8, 1954, in the above-entitled cause, and says that in the entry of the final judgment the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in holding that, on the facts alleged, there is no valid distinction between this case and the *Federal Baseball* case (259 U. S. 200) and the *Toolson* case (346 U. S. 356).

2. The court erred in holding that the Supreme Court in the *Federal Baseball* and *Toolson* cases laid down a broad principle which takes all professional sports, no matter how conducted, out of the Sherman Act.

3. The court erred in adjudging that the complaint fails to state a claim upon which relief can be granted.

4. The court erred in entering judgment dismissing the complaint.

35 Wherefore, plaintiff prays that the final judgment of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as to the court may seem just and proper.

STANLEY N. BARNES,
Assistant Attorney General.
HAROLD LASSER,
Special Assistant to the Attorney General.

Dated this 12th day of March, 1954.

36 STATEMENT CALLING ATTENTION TO THE PROVISIONS OF SUPREME COURT RULE 12(3)

(Omitted in Printing)

37 In the United States District Court for the Southern District of New York

[Title omitted]

PRAECIPE—Filed March 12, 1954

To: The Clerk, United States District Court, Southern District of New York.

The appellant hereby directs that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Complaint.
2. Answers of all defendants.
3. Motion for preference on non-jury civil trial calendar filed April 28, 1953, affidavits attached to notice of motion, and supplemental affidavits filed on April 28, 1953.
4. Defendants' motion to dismiss the complaint.
5. Stipulation amending complaint filed January 8, 1954.
6. Order dismissing complaint entered February 8, 1954.
7. Copy of all docket entries.
8. Petition for Appeal.
9. Order Allowing Appeal.
10. Citation on Appeal.
11. Assignment of Errors.

38-40 12. Statement of Jurisdiction of the Supreme Court of the United States.

13. Statement of Appellant Calling Attention to Rule 12(3) of the Rules of the United States Supreme Court.
14. Proof of Service.
15. This Praecipe.

STANLEY N. BARNES,
Assistant Attorney General.
HAROLD LASSER,
Special Assistant to the Attorney General.

Dated this 12th day of March, 1954.

41-43 PROOF OF SERVICE

(Omitted in Printing)

44 [File endorsement omitted]

In United States District Court, Southern District of New York
[Title omitted]

[Title omitted]

NOTICE OF MOTION—To strike Items 2 and 3 from Praecipe—Filed March 19, 1954

Sirs:

Please take notice that upon the annexed affidavit of Benjamin C. Milner, the undersigned will move this Court at a Stated Term thereof for the hearing of motions to be held in and for the Southern District of New York, in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 25th day of March, 1954, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 10 of the Rules of the United States Supreme Court and Section (e) of Rule 75 of the Rules of Civil Procedure, striking from the praecipe dated March 12, 1954, heretofore filed herein, items No. 2 and 3 thereof and for such other, further and different relief as to the Court may
45 seem just and proper.

Dated, New York, N. Y.
March 19, 1954.

Yours, etc.,

SIMPSON, THACHER & BARTLETT,
By BENJAMIN C. MILNER, *a Partner*,
Office and Post Office Adddress,
120 Broadway,
New York 5, N. Y.
Attorneys for Defendants, International Boxing Club of New York, Inc., and Madison Square Garden Corporation.

PEABODY, WESTBROOK, WATSON AND STEPHENSON,
By CHARLES H. WATSON, *a Partner*,
10 South LaSalle Street,
Chicago, Illinois.

REID & PRIEST,
By RALPH MCDERMID, *a Partner*,
2 Rector Street,
New York 6, N. Y.
Attorneys for Defendants, International Boxing Club, Inc., an Illinois corporation, James D. Norris and Arthur M. Wirtz.

To:

STANLEY E. BARNES, ESQ.,
Assistant Attorney General,
RICHARD B. O'DONNELL, ESQ.,
HAROLD LASSER, ESQ.,
Special Assistants to the Attorney General,
Room 235, U. S. Court House,
Foley Square,
New York 7, N. Y.
Attorneys for the Plaintiff.

46 AFFIDAVIT

State of New York,
County of New York, ss:

BENJAMIN C. MILNER, being duly sworn, deposes and says:

I am an attorney and a member of the firm of Simpson, Thacher & Bartlett, attorney, for defendants International Boxing Club of New York, Inc. and Madison Square Garden Corporation, and I am familiar with all the proceedings heretofore had in this action. On Friday, March 12, 1954, plaintiff served upon counsel for all defendants herein various papers relating to an appeal by plaintiff to the Supreme Court of the United States from the order of this Court (Hon. Gregory F. Noonan, D. J.), dated February 8, 1954, dismissing the complaint herein for lack of jurisdiction of the subject matter of the action and for failure to state a claim upon which relief can be granted.

47 Among the papers so served was a praecipe indicating the portions of the record to be incorporated by the Clerk of this Court into the transcript, as required by Rule 10 of the Rules of the Supreme Court. Among the items designated in said praecipe are the following:

"2. Answers of all defendants.

"3. Motion for preference on non-jury civil trial calendar filed April 28, 1953, affidavits attached to notice of motion and supplemental affidavits filed on April 28, 1953."

Defendants object to the inclusion of the above items in the transcript of record to be transmitted to the Supreme Court on the ground that said items are not essential to the decision of the questions presented by the appeal and therefore must be omitted under Section (e) of Rule 75 of the Federal Rules of Civil Procedure, which Section (e) is applicable to appeals to the Supreme Court from a district court. (See Rule 10 of the Supreme Court Rules).

The papers described in items "2" and "3" above were not before the District Court upon the motion resulting in the order here ap-

pealed from, as clearly appears from the face of said order. The only papers before the Court on such motion were the summons and complaint, the Marshal's return of service, the stipulation dated January 7, 1954 amending the complaint and defendants' notice of motion. As appears from its face, the motion resulting in the order appealed from was directed to the complaint alone. The inclusion in the record for appeal purposes of documents which this Court did not and could not consider in
48-49 connection with such motion is not only not essential to the determination of the questions presented by the appeal but is obviously improper as tending to mislead the appellate court concerning the basis of this Court's action.

WHEREFORE, deponent respectfully requests this Court to make and enter an order herein striking from the praecipe dated March 12, 1954 heretofore filed with the Clerk of this Court, items "2" and "3" thereof and for such other and further relief as may be just and proper.

Sworn to before me this 19th day of March, 1954.

BENJAMIN C. MILNER.

ROBERT S. CARLSON, Notary Public, State of New York, qualified in Westchester County, No. 60-0570175. Certificate filed with New York Co. Clk. Commission expires March 30, 1955.

50 April 8, 1954.

Respectfully referred to Judge Noonan.

IRVING R. KAUFMAN,
U. S. D. J.

Opinion # 21071, Noonan, J.

51-53 [File endorsement omitted]

In the United States District Court for the Southern District of New York

[Title omitted]

STIPULATION AND ORDER EXTENDING TO FILE RECORD—Filed April 21, 1954

It appearing that this Court has not rendered its decision with respect to the motion before it to strike certain items from the praecipe dated March 12, 1954, and it further appearing that counsel for the appellees having agreed to extend the time for filing the transcript of record on appeal from April 21, 1954 to May 6, 1954,

NOW THEREFORE, IT IS stipulated and agreed by and among the

parties hereto that the time for filing such record of transcript on appeal be and the same is extended to May 6, 1954.

Dated: New York, N. Y. April 20, 1954.

HAROLD LASSER,
Attorney for Plaintiff.

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendants, International Boxing Club of New York, Inc., and Madison Square Garden Corporation.

PEABODY, WESTBROOK, WATSON & STEPHENSON,
REID & PRIEST,
Attorneys for Defendants, International Boxing Club, Inc., an Illinois corporation, James D. Norris and Arthur M. Wirtz.

So Ordered: 4-21-54.

GREGORY F. NOONAN,
U. S. D. J.
W. V. C.

54 [File endorsement omitted]

In the United States District Court, Southern District of New York

UNITED STATES OF AMERICA, PLAINTIFF,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., a corporation of New York; INTERNATIONAL BOXING CLUB, a corporation of Illinois; MADISON SQUARE GARDEN CORPORATION, a corporation of New York; JAMES D. NORRIS; and ARTHUR M. WIRTZ, DEFENDANTS.

Memorandum

Civ. 74-81

OPINION ON MOTION TO STRIKE ANSWERS AND MOTION FOR PREFERENCE—Filed April 22, 1954

NOONAN, District Judge.

On February 4, 1954, this Court granted a motion made by the respondents to dismiss the complaint in this action for lack of jurisdiction of the subject matter of the action and for failure to state a claim upon which relief could be granted. This decision was rendered from the bench after oral argument, and an order

entered February 8, 1954, pursuant to that decision, is now the subject of an appeal to the Supreme Court of the United States.

Despite the fact that the order itself states that the decision of the court was based on "* * * the summons and complaint and the Marshal's return herein, the stipulation dated January 7, 1954 amending the complaint herein, the notice of motion dated December 2, 1953, and after hearing counsel * * *" (for both sides), the plaintiff seeks to include two other items in the praecipe. These two items, which are the subject of this motion to strike, are (1) the answers of the parties, and (2) the papers connected with an earlier motion for a preference.

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Two specific problems are thus before this court: whether these two items are properly a part of the record; and, if not, whether this court has the authority to strike them.

On the first question, it is the opinion of this court that the items attacked are not properly part of the "record" for purposes of appeal. They did not form a part of the papers on which the decision was based nor was reference made to them on the argument. Although they were in the file of the case, they were never "before" the court during the course of the argument on the motion to dismiss.

The purpose of an appeal is to correct an error or errors made in the court below. In the instant case, that would entail a showing that the complaint in the action does state a claim upon which relief could be granted, and that this court does have jurisdiction over the subject matter. Unless both grounds for dismissal are found to be in error, the action must stand as dismissed.

Looking to the question of whether or not the complaint states a claim upon which relief can be granted, it is clear that neither answers, nor affidavits filed in connection with an unrelated motion can bear out the sufficiency of the complaint. It must stand or fall on its own merits.

56

Both because these matters were never before this court when it was called upon to make its decision, and because they are not relevant to the sufficiency of the complaint, the inclusion of these disputed items in the praecipe is neither necessary nor proper. They do not form a material part of the record, nor do they properly reflect what occurred in this court.

Accordingly, it is the opinion of this court that the motion to strike should be granted if this court has the power so to do.

Rule 10(2) of the Revised Rules of the Supreme Court of the United States (Title 28, U. S. Code) provides that the clerk of the lower court shall forward to the Supreme Court * * * * a true copy of the material parts of the record * * * *. The praecipe is authorized to enable the clerk to do so and * * * * for the purpose of reducing the size of transcripts and eliminating all papers not

necessary to the consideration of the questions to be reviewed * * * *. The rule then goes on to incorporate by reference Sections (c), (e), and (h) of Rule 75 and Rule 76 of the Rules of Civil Procedure (Title 28 U. S. Code).

Of those portions of Rule 75 and Rule 76 of the Rules of Civil Procedure incorporated by reference into Rule 10 of the
57 Supreme Court Rules, only Rules 75 (e) and (h) are applicable to the instant situation.

Rule 75 (e) entitled "Record To Be Abbreviated", opens with the sentence "All matter not essential to the decision of the questions presented by the appeal shall be omitted."

Rule 75 (h) is entitled "Power of Court to Correct or Modify Record" and provides that "* * * if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

It is essentially the wording of this last paragraph on which rests the authority of this court to grant the motion to strike the disputed items from the praecipe.

In 1886, in the case of *Hoe* v. *Kahler*, Circ. Ct. S. D. N. Y., 27 Fed. 145, 146, the court stated, "* * * a direction of this court in a doubtful case, where the clerk is requested to insert in the transcript by one party what he is requested to leave out by the other, would seem to be proper."

In the case of *U. S.* v. *City of Brookhaven*, 1943, 134 F. 2d 442, 446, rehearing denied, the court, referring to the inclusion in the record on appeal of a deposition taken, but never introduced into evidence in the lower court, stated:

> "Unless someone offered it in evidence on the trial it was not evidence in the case, nor was it proper to be transmitted as such with the record on appeal. When designated by appellees to be certified and sent up as a part of such record, appellant should have applied to the district court under the first
> 58 sentence of Rule 75 (h) to have the deposition excluded as not having been introduced and considered in the trial."

In the instant case, the items in dispute were not introduced or considered in the determination of the motion. The appellees have moved to strike them from the praecipe. For all of the above reasons, the motion is granted.

So ordered.

Dated, New York, N. Y. April 22, 1954.

GREGORY F. NOONAN,
U. S. D. J.

59 Clerk's Certificate to foregoing transcript omitted in printing.

No. 729

60-61 In the Supreme Court of the United States

October Term, 1953

UNITED STATES OF AMERICA, APPELLANT,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL.

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 6, 1954

1. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

2. Appellant designates for printing by the Clerk of this Court the record as filed in this Court pursuant to appellant's praecipe to the clerk of the United States District Court for the Southern District of New York, except Items 2, 3, ten, twelve, thirteen and fourteen of said praecipe.

SIMON E. SOBELOFF,
Solicitor General.

May 6, 1954

62 [File endorsement omitted]

63 In the Supreme Court of the United States

No. 729 —, October Term, 1953

[Title omitted]

APPEAL from the United States District Court for the Southern District of New York.

ORDER NOTING PROBABLE JURISDICTION—Filed May 24, 1954

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

☆ U. S. GOVERNMENT PRINTING OFFICE 1954 902209 1479

No. [redacted]-53

In the Supreme Court of the United States

October Term, 1953

UNITED STATES OF AMERICA, APPELLANT,

vs.

[redacted]

[redacted]

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 74-81

UNITED STATES OF AMERICA, PLAINTIFF

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., INTERNATIONAL BOXING CLUB, MADISON SQUARE GARDEN CORPORATION, JAMES D. NORRIS AND ARTHUR M. WIRTZ, DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on February 8, 1954. A petition for appeal is presented to the district court herewith, to-wit, on this 12th day of March, 1954.

OPINION BELOW

The district court did not render a written opinion. At the conclusion of argument on defendants' motion to dismiss the complaint, the court ruled that it would grant the motion, but the reasons which it gave for this ruling were not transcribed.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Women's Sportswear Mfg. Assn.*, 336 U.S. 460;

United States v. *New Wrinkle, Inc.*, 342 U.S. 371.

QUESTIONS PRESENTED

1. Whether, under the facts stated in the complaint, the decision in *Toolson* v. *New York Yankees*, 346 U.S. 356, is controlling as to the application of the Sherman Act to the acts and conduct charged against the defendants—restraint and monopolization, on a multi-state basis, of the promotion, exhibition, broadcasting, telecasting, and motion-picture production and distribution of professional championship boxing contests.

2. Whether the acts of the defendants, as stated in the complaint, constitute "trade or commerce among the several States" within the meaning of Sections 1 and 2 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended

(15 U.S.C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

In this civil action under Section 4 of the Sherman Act the complaint charges (par. 17) that since early in 1949 the defendants have been conspiring to restrain and to monopolize, and have

been monopolizing, interstate commerce in the promotion, exhibition, broadcasting, telecasting, and motion-picture production and distribution, of professional championship boxing contests.[1] Shortly after the decision in *Toolson* v. *New York Yankees*, 346 U.S. 356, the defendants filed a motion to dismiss the complaint upon the authority of that decision. Following submission of briefs and oral argument, the district court granted this motion.

The following facts stated in the complaint, which are taken as true on the motion to dismiss, are believed pertinent:

The corporate defendants are International Boxing Club of New York, Inc., International Boxing Club, and Madison Square Garden Corporation, which will be respectively referred to as IBC (N.Y.), IBC(Ill.), and Garden. The two individual defendants, James D. Norris and Arthur M. Wirtz, together with Garden, own 80% of the stock of IBC(N.Y.) and of IBC (Ill.). (Pars. 3-9.)

A professional boxer greatly enhances his earning power if he obtains recognition as "world champion" of the weight division in which he competes, and, for the promoter, championship contests are more remunerative than other boxing contests (par. 11).

Substantially all of the revenue which a promoter derives from championship contests comes from

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[1] A copy of the complaint as originally filed is attached hereto as Appendix A. A copy of paragraph 16(a) of the complaint, which was added by stipulation of the parties, is attached hereto as Appendix B.

either tickets of admission or sale of television, radio and motion-picture rights. Since 1949, sale of these rights has represented, on the average, more than 25% of the receipts from championship fights. This proportion has been progressively increasing, and in a heavyweight championship contest in May 1953 receipts from sale of these rights exceeded the receipts from tickets of admission (less federal admission taxes). (Par. 16(a).)

Defendants' conspiracy has consisted of a continuing agreement to exclude others from promoting championship boxing contests in the United States, and from selling television, radio and motion-picture rights for such contests (par. 18). In order to effectuate their conspiracy and resulting monopolization (par. 19), the defendants early in January 1949 agreed among themselves and with Joe Louis, then heavyweight champion of the world, that he would resign his title as heavyweight champion, that he would procure exclusive rights to the services of the four leading contenders for this title in a series of elimination contests which would result in recognition of a new heavyweight world champion, and that he would assign these exclusive rights to defendants (par. 20). Contracts were thereupon entered into between a corporation in which Joe Louis owned a majority of the stock and the four leading contenders for his title, and these contracts, which granted said corporation the exclusive television and radio rights to broadcast the elimination contests, were assigned to IBC (Ill.) (pars. 21-22).

The defendants, as a part of their conspiracy and resulting monopolization (par. 19), have eliminated the "leading competing promoter" of championship matches (par. 23); have acquired the exclusive right to promote professional boxing contests at the principal arenas at which championship contests can be successfully presented (pars. 24-25); have required each title contender to agree that, should he win, he still, for a period of three (or sometimes five) years, take part only in title contests promoted by the defendants (par. 26); and defendants have promoted all but two of the 21 championship contests held in the United States since June 1949 (par. 27).[2]

THE QUESTIONS ARE SUBSTANTIAL

Since defendants' motion to dismiss the complaint was made and granted on the authority of *Toolson* v. *New York Yankees,* 346 U. S. 356, we first call attention to the grounds of that decision. The Court stated that it had held in 1922 in *Federal Baseball Club* v. *National League,* 259 U. S. 200, that the business of providing baseball games between clubs of professional baseball players is not within the scope of the Sherman Act; that the business had been left to develop for 30 years "on the understanding" that it was not subject to this Act; and that Congress, which had had the *Federal Baseball* ruling under consideration, had not seen fit to bring the business under the Act. These factors led the Court to conclude that, if there are evils

[2] The receipts from these 21 contests have been approximately $4,500,000 (par. 16).

in the field of organized baseball which now warrant applying the antitrust laws to it, this should be by legislation having prospective effect rather than by overruling the Court's 1922 decision "with retrospective effect."

In both the *Toolson* case and the *Federal Baseball* case, the foundation of the charge of Sherman Act violation was (1) the tightly integrated organization of all clubs having professional baseball teams, and (2) the agreement by each club to include a uniform "reserve clause" in every player contract and not to deal with any player except on the basis of the provisions of such clause and the rules adopted to implement it. There was thus practically complete identity in the Sherman Act issue presented in the two cases.

We submit that the holding of the *Toolson* case is confined to the application of the Sherman Act to organized baseball, the only issue on which the Court ruled in the *Federal Baseball* case. The *Toolson* case represents an application of the doctrine of *stare decisis* to the particular circumstances presented. It does not hold, as a matter of construction of the Sherman Act, that other activities which in one respect or another are comparable to the baseball business are for that reason outside the scope of the Act.

Over and beyond the foregoing, we submit that the business of promoting professional championship boxing contests, as conducted by the defendants during the period covered by this proceeding, has characteristics which make the *Federal Base-*

ball ruling not controlling. Telecasting and broadcasting the contests which defendants promote, and making and distributing motion pictures of these contests, are an integral part of defendants' business, being the source of about 25% of their receipts. Here the allegation is, *inter alia*, that broadcasting, telecasting and motion picture distribution are monopolized and restrained. Pars. 17, 18, 21.[3] Although the record in the *Federal Baseball* case shows that the two Major Leagues received substantial sums from sale of the right to transmit telegraphic play-by-play descriptions of Major League games, it does not appear that this was a significant or material element of the baseball business as then conducted.[4] Under the radically different facts as to the business of the present defendants, the decision in *Federal Baseball* cannot be deemed an authoritative determination that the business of these defendants is beyond the scope of the Sherman Act.

Telecasting of boxing contests involves the simultaneous transmission of the contests, by sight and sound, to hundreds of thousands of people located in virtually every state of the Union. Broadcasting by radio involves simultaneous interstate transmis-

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[3] "The contracts also provided that Enterprises, or any party or corporation designated by it, was to have the exclusive right to broadcast any of the contests, both in radio and television, and the exclusive right to arrange for the production and distribution of motion picture films of said contests" (par. 21).

[4] The telegraphic reports are not even mentioned in the opinion of this Court or in the opinion of the court of appeals (269 Fed. 681, C.A. D.C.).

sion of the sounds of the fight and audience reaction, and of the drama of the fight as conveyed by the tone and words of an eye-witness reporter of it. Making a motion picture of a fight records it in picture and sound, for subsequent reproduction of it in various states, in a form perhaps more vivid than what was seen by most of those present at the fight.

Broadcasting is trade and commerce within the meaning of the Sherman Act, and unreasonable restraint or monopolization of a part of this commerce is a violation of the Act. *Lorain Journal Co.* v. *United States*, 342 U. S. 143; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 223. The contracts which have the effect of excluding others from the business of promoting championship boxing contests also exclude them from the broadcasting which is an integral part of this business. No comparable exclusion was ruled upon in the *Federal Baseball* case.

The Court's 1922 holding that contracts tying baseball players to a particular club (except as it might otherwise agree) did not concern interstate trade or commerce as embraced by the Sherman Act was premised on the view that the contracts were for personal effort in giving exhibitions of baseball, and that these exhibitions are purely local and involve no "transfer" of goods, persons, or "intelligence" from one state to another. The Court said that the decision by the court of appeals "went to the root of the case" (259 U. S. at p. 208). The reasoning of that court was that "trade and com-

merce require the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another"; and that a game of baseball is "local in its beginning and in its end" and "not susceptible of being transferred" (269 Fed. at pp. 684-685).[5]

The facts here show what was found to be lacking in the *Federal Baseball* case, transfer of the exhibition (or contest), by means of electric waves, to persons in other states, and recording the contest for the purpose of reproducing it, visually and orally, in motion picture theatres in various states.

We submit that the present appeal, like the appeal taken to this Court from the judgment of dismissal entered in *United States* v. *Shubert* (S.D. N.Y.), raises a substantial question concerning the scope of the *stare decisis* rule applied in the *Toolson* case. Determination by this Court of the scope of that ruling is of manifest importance both to the Government and to private litigants.

In addition, the question whether the United States is powerless to proceed under the Sherman Act against monopolistic practices in the promotion of championship boxing contests is in itself of public importance. That the field is one in which there is a wide public interest is shown by the fact that professional boxing "is almost without exception the subject of extensive regulation by state or

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[5] Since the business of the defendants was regarded as being the giving of exhibitions of baseball, the interstate transportation preceding and following the exhibitions was deemed not a part of the business which had been restrained or monopolized.

municipal athletic commissions or commissioners.[6]" Affidavits filed in this case evidence the concern of such regulatory agencies with the monpolistic practices charged in the Government's complaint. An affidavit by the chairman of the New York State Athletic Commission states: "An early determination of the legality of IBC's activities is vital to the survival of competitive professional boxing in New York." An affidavit by the Executive Secretary (and former president) of the National Boxing Association[7] states: "Independent boxing clubs throughout the United States are being forced out of business. * * * As a result of the monopoly alleged, 'package' deals are sold by defendants to advertisers, radio and television broadcasters, eliminating independent clubs or promoters from this phase of the business. The public interest in this industry is very great."

We submit that the questions presented by the appeal are substantial and of public importance.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

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[6] Defendants' district court brief on motion to dismiss (p. 6).

[7] This organization includes in its membership 94 boxing commissions, each appointed by local or state authority.

APPENDIX A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 74-81

UNITED STATES OF AMERICA, PLAINTIFF,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., A CORPORATION OF NEW YORK; INTERNATIONAL BOXING CLUB, A CORPORATION OF ILLINOIS; MADISON SQUARE GARDEN CORPORATION, A CORPORATION OF NEW YORK; JAMES D. NORRIS; AND ARTHUR M. WIRTZ, DEFENDANTS.

Filed March 17, 1952

COMPLAINT

The United States of America, plaintiff, by its attorneys acting under the direction of the Attorney General of the United States, brings this action against the defendants and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890 (c. 647, 26 Stat. 209, 15 U. S. C., Sec. 4) as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, to prevent and restrain

continuing violations by them, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act.

2. The corporate defendants, the International Boxing Club of New York, Inc. and the Madison Square Garden Corporation, maintain offices, transact business and are found within the Southern District of New York.

II

The Defendants

3. International Boxing Club of New York, Inc., a corporation organized and existing under the laws of the State of New York (hereinafter referred to as "IBC (N.Y.)"), is made a defendant herein. IBC (N.Y.) maintains its offices and its principal place of business in New York City. It is engaged, among other things, in the promotion and exhibition of professional boxing contests.

4. International Boxing Club, a corporation organized and existing under the laws of the State of Illinois (hereinafter referred to as "IBC (Ill.)"), is made a defendant herein. IBC (Ill.) maintains its offices and principal place of business at Chicago, Illinois. It is engaged, among other things, in the promotion and exhibition of professional boxing contests.

5. The Madison Square Garden Corporation (hereinafter referred to as the "Garden"), is made a defendant herein. The Garden is a corporation organized and existing under the laws of the State of New York, with its offices and principal place of business at New York City. It is engaged, among other things, in the maintenance and operation of the Madison Square Garden, the foremost sports

arena in New York City, utilized for all major indoor sports including professional boxing, with a seating capacity in excess of 18,000.

6. James D. Norris, a resident of New York City, is hereby made a defendant herein.

7. Arthur M. Wirtz, a resident of Chicago, Illinois, is hereby made a defendant herein.

8. Defendants Norris, Wirtz and the Garden, respectively, are associated with, or own stock in, or hold office in the defendants IBC (N.Y.) and IBC (Ill.), as follows:

Deft.	Garden	IBC (N.Y.)	IBC (Ill.)
Norris	Director	President, Director and owner of 20% of outstanding shares of Class A common stock	President, Director and owner of 20% of outstanding shares of Class A common stock and of 40% of outstanding shares of Class B common stock
Wirtz	Director	Director and owner of 20% outstanding shares of Class A common stock	Director and owner of 20% outstanding shares of Class A common stock and of 40% of outstanding shares of Class B common stock
Garden	—	Owner of 40% of outstanding shares of Class A common stock and of 80% of outstanding shares of Class B common stock	Owner of 20% of outstanding shares of Class A common stock

In addition to the stockholdings in IBC (N. Y.) and IBC (Ill.) described above in this paragraph, 20% of the outstanding shares of Class A common stock and 20% of the outstanding shares of Class B common stock of each corporation is owned by Truman K. Gibson, Jr. and Theodore R. Jones as trustees for Joe Louis Barrow (hereinafter called "Joe Louis").

9. IBC (N. Y.) has issued 1,000 shares of Class A stock and 100 shares of Class B stock with all shares having a par value of $1.00 per share and entitled to one vote per share. Its certificate of incorporation, as amended, provides as follows:

> No dividends shall be declared or paid with respect to any share of the Class A Stock unless there shall have been previously or contemporaneously declared and paid, or declared and set aside for payment, in the same fiscal year, the sum of $100.00 per share with respect to each outstanding share of Class B Stock for each $1.00 per share of dividend declared or paid with respect to the Class A Stock in said fiscal year, it being the intention that dividends shall be payable at the rate of $100.00 per share with respect to the Class B stock for each $1.00 per share paid with respect to the Class A Stock.

The same provision exists in the certificate of incorporation, as amended, of IBC (Ill.) which has issued the same number of shares of stock as IBC (N. Y.).

III

Nature of Trade and Commerce Involved

10. Boxers usually compete in amateur tournaments as a preliminary to becoming professionals. As amateurs they receive no pay and box under the sponsorship of local independent boxing clubs, associations or other organizations. When they become professionals, they contract to box an opponent on a per bout basis for local promoters and

receive a fee. If their skill as professional boxers results in an increasing willingness of the public to pay to view their contests, they can demand higher fees and a greater percentage of receipts from the sale of tickets and other rights. If their skill increases, they engage in preliminary and other bouts throughout the United States and eventually participate in major bouts. The fee for a major bout is usually a sum guaranteed by the promoter or a predetermined percentage of the net receipts from the sale of tickets and motion picture, radio and television rights.

1. The most lucrative asset to a professional boxer is recognition and designation by the various state athletic commissions and others as "world champion" in the division in which he competes. These divisions are:

flyweight	112 lbs.
bantamweight	118 "
featherweight	126 "
lightweight	123 "
welterweight	147 "
middleweight	160 "
light heavyweight	175 "
heavyweight	All above 175 lbs.

A "world champion" gains his title by defeating the existing champion or by eliminating all contenders, and remains world champion in his division until he is, in turn, defeated by a contender or resigns the title. Such a title affords to its holder financial returns from personal appearances and exhibitions throughout the United States, from endorsements and other activities, as well as a greater

percentage of the receipts from his bouts. The promotion of professional championship boxing contests is also more lucrative than the promotion of other boxing contests.

12. Of the various "world championships," the heavyweight division is the most important to boxers and promoters, as it returns the greatest financial benefits. The flyweight and bantamweight divisions are not of substantial importance in the United States because very few American boxers are of such light weights. No championship contest has been held in the flyweight division in the United States since 1935; none in the bantamweight division since 1947.

13. The promotion of professional championship boxing contests, in which the winners achieve "world champion" titles, includes negotiating and executing contracts with boxers for the main and preliminary bouts, arranging and maintaining training quarters, leasing suitable arenas, such as stadia or ball parks where substantial numbers of the public may be seated to view the contest, negotiating and executing contracts for the employment of matchmakers, advertising agencies, press agents, seconds, referees, judges, announcers and other personnel; organizing, assembling, and arranging other details necessary to the exhibition of the contests; selling tickets and rights to make motion pictures of the contests and to distribute them throughout the United States and in foreign countries; and selling rights to transmit the contests by radio or television throughout the United States and foreign countries.

14. Promoters of professional championship

boxing contests make a substantial utilization of the channels of interstate trade and commerce to:

(a) negotiate contracts with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than those in which the promoters reside;

(b) arrange and maintain training quarters in states other than those in which the promoters reside:

(c) lease suitable arenas, and arrange other details for boxing contests, particularly when the contests are held in states other than those in which the promoters reside;

(d) sell tickets to contests across state lines;

(e) negotiate for the sale of and sell rights to make and distribute motion pictures of boxing contests to the 18,000 theatres in the United States;

(f) negotiate for the sale of and sell rights to broadcast and telecast boxing contests to homes through more than 3,000 radio stations and 100 television stations in the United States; and

(g) negotiate for the sale of and sell rights to telecast boxing contests to some 200 motion picture theatres in various states of the United States for display by large-screen television.

15. Motion picture films of professional championship boxing contests are distributed and exhibited in theatres throughout the United States and in foreign countries. Similarly, radio and television broadcasts of such contests are transmitted

throughout the United States and radio broadcasts of them are also transmitted to foreign countries.

16. The 21 major professional championship boxing contests promoted in the United States since June 1949 have produced a gross income from admissions and the sale of motion picture, radio and television rights of approximately $4,500,000.00. The total such gross income for all professional boxing contests in the United States during this period, including the championship contests, has been approximately $15,000,000.00.

IV

Offenses Charged

17. Beginning in or about January 1949, the exact date being unknown to the plaintiff, and continuously thereafter up to and including the date of the filing of this complaint, the defendants have been and now are engaged in an unlawful combination and conspiracy in unreasonable restraint of and to monopolize the above described interstate and foreign trade and commerce in the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests in the United States, and have monopolized said trade and commerce, in violation of Sections 1 and 2 of the Sherman Act. The defendants threaten to continue such offenses and will continue them unless the relief hereinafter prayed for in this complaint is granted.

18. The aforesaid combination and conspiracy, which has resulted in the said monopolization, has consisted of a continuing agreement and concert

of action among the defendants to exclude others from the promotion and exhibition of and the sale of radio, television and motion picture rights in professional championship boxing contests in the United States.

19. To effectuate said offenses, the defendants have done those things which they combined and conspired to do, including in part the acts, means, methods, contracts, agreements and understandings hereinafter more fully set forth and described.

20. In or about January 1949 these defendants entered into understandings and agreements among themselves and with Joe Louis, then heavyweight champion of the world, under the terms of which Joe Louis agreed to retire from active boxing, resign the title of heavyweight champion of the world, procure the exclusive rights to the services of the four leading contenders for the heavyweight title in a series of elimination contests which would result in the recognition of a new heavyweight champion of the world, and assign these exclusive rights to defendants. The understandings and agreements also provided that Joe Louis was to receive $150,000 from these defendants and was to receive stock in the corporations which were to be formed by these defendants.

21. Contracts were entered into between Joe Louis Enterprises, Inc. (hereinafter referred to as "Enterprises"), an Illinois corporation in which Joe Louis owned the majority stock interest, and Joe Walcott, Ezzard Charles, Lee Savold and Gus Lesnevich, the then leading contenders for Louis' heavyweight title, on or about February 14, 1949. These contracts provided, among other

things, that the exclusive services of Walcott, Charles, Savold and Lesnevich were to be rendered to Enterprises or its assignee and that an elimination professional contest was to be conducted among them for the heavyweight championship of the world in contests staged in the United States or elsewhere throughout the world. The contracts also provided that Enterprises, or any party or corporation designated by it, was to have the exclusive right to broadcast any of the contests, both in radio and television, and the exclusive right to arrange for the production and distribution of motion picture films of said contests.

22. Thereafter Joe Louis resigned his title as heavyweight champion of the world and, through agreements and understandings entered into among the defendants and with others, there were formed the defendant corporations IBC (N. Y.) and IBC (Ill.). The contracts referred to in paragraph 21 of this complaint were assigned to the defendant IBC (Ill.); $150,000 was paid to Joe Louis; and the elimination heavyweight championship contests were promoted by the defendants.

23. About May 27, 1949 IBC (N. Y.) acquired and eliminated the leading competing promoter of championship matches, Tournament of Champions, Inc. (hereinafter referred to as "champions"), a corporation organized in the State of New Jersey qualified to do business in New York, and the owner of all issued and outstanding stock of Sporting Events, Inc., a corporation of the State of New York licensed to promote boxing contests in the State of New York. Champions and Sporting Events, Inc. had been engaged in the promo-

tion of professional championship boxing. By said purchase the defendants, through IBC (N. Y.), acquired the following:

(a) An exclusive lease dated March 15, 1949, to promote professional boxing at the Polo Grounds, New York City, which was secured by a deposit of $50,000;

(b) A contract between Champions and Marcel Cerdan to engage in a world's championship middleweight bout with Tony Zale;

(c) A similar contract with Tony Zale to engage in such bout;

(d) A contract with Ray Robinson dated April 1949 fixing a match with Kid Gavilan for the world's welterweight championship.

24. At the time IBC (N. Y.) was formed, the defendant, through leases, agreements, understandings, and through stock ownership in corporations, possessed the exclusive right to promote professional boxing contests at the following arenas, which except for Yankee Stadium in New York City, are the principal arenas where professional championship boxing contests can successfully be presented:

Polo Grounds	New York
Madison Square Garden	New York
St. Nicholas Arena	New York
Chicago Stadium	Chicago
Detroit Olympia	Detroit
St. Louis Arena	St. Louis

25. On July 15, 1949, IBC (N. Y.) acquired the exclusive right to promote professional boxing

contests in the Yankee Stadium, and extended its exclusive rights to the Polo Grounds until December 31, 1952.

26. The defendants, after the formation of IBC (N. Y.) and IBC (Ill.), promoted professional championship boxing contests through these corporations in all weight divisions except the bantamweight and flyweight. In the promotion of each such contest, the contender for the title was required, as a condition of being afforded an opportunity to acquire the title, to agree with the promoter (either IBC (N. Y.) or IBC (Ill.)), among other things, that:

> (a) Should he be declared the winner and gain the title he would, for a period of three years (or five years in some cases), commencing from the time he was declared the winner, render his services as a professional boxer in title contests exclusively to the defendant promoter, and would engage in title contests only under its promotion or that of a party or corporation designated by it, or with which it is or may be affiliated;
>
> (b) Should he lose his title before the expiration of the three years, he agreed to box at least twice thereafter for the defendant promoter, or its designees; and
>
> (c) Should he win the title, he would engage in a return title contest with the deposed champion within 90 days under the promotion of the defendant promoter or its designee.

The defendants, through IBC (N. Y.) and IBC (Ill.), have promoted or participated in the pro-

motion of all but two of the 21 professional championship boxing contests held in the United States since June 1949.

V

Effects

28. The aforesaid combination and conspiracy, and monopolization, has had the following effects:

(a) Promoters of boxing contests, other than defendants, have been almost entirely excluded from engaging in the business of promoting professional championship boxing contests except with the consent of defendants;

(b) Boxers have been denied a chance to compete for world championships except under conditions that prevented them, if they won, from securing the benefits of competition among promoters desiring their services to present professional championship boxing contests; and

(c) The benefits of competition among promoters of professional championship boxing contests have been denied to:

(1) manufacturers and distributors of motion pictures of such contests;

(2) radio and television broadcasters and stations;

(3) the public attending such contests, seeing them in motion pictures or television, or hearing them by radio;

(4) the owners of arenas other than those owned by defendants.

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendants and each of them have combined and conspired to restrain and to monopolize, and have restrained and monopolized, interstate and foreign trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act, and that defendants be enjoined and restrained from continuing such violations or committing other violations of like character or effect.

2. That the Court adjudge and decree that the defendants have used the agreements referred to in paragraph 26 of this complaint and their financial and contractual interests in and control over arenas and organizations engaged in the promotion of professional championship boxing contests, as hereinabove described, unlawfully in instituting, effectuating and maintaining the aforesaid violations of Sections 1 and 2 of the Sherman Act.

3. That the Court order and direct the cancellation and termination of the agreements referred to in paragraph 26 of this complaint, and that the defendants be enjoined and restrained from enforcing such agreements and from entering into any agreements of like character or effect.

4. That defendant Garden be enjoined from leasing its arena exclusively for professional championship boxing contests to any promoter of such con-

tests, and from discriminating against any promoter desiring to lease said arena for a professional championship boxing contest.

5. That defendants Norris and Wirtz be ordered and directed to cause the arenas listed in paragraph 24 of this complaint, as long as any of such arenas are controlled by these defendants, directly or indirectly, to refrain from leasing their facilities exclusively for professional championship boxing contests to any promoter of such contests, and to refrain from discriminating against any promoter desiring to lease any of such facilities for a professional championship boxing contest.

6. That the Court enter such further orders regarding the aforesaid interests in and control over arenas and organizations engaged in the promotion of professional championship boxing contests as may be necessary and appropriate in order to dissipate the effects of the violations alleged herein and to restore free and open competition in the trade and commerce in the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests.

7. That pursuant to Section 5 of the Sherman Act, an order be made and entered herein requiring such of the defendants as are not within this District to be brought before the Court in this proceeding as parties defendant, and directing the Marshals of the Districts in which they severally reside or are found to serve the summons upon them.

8. That the plaintiff have such other, further and different relief as the nature of the case may re-

quire and the Court may deem just and proper in the premises.

9. That the plaintiff recover its taxable costs.

Dated: New York, N.Y. March 17, 1952.

(S.) J. HOWARD MCGRATH,
Attorney General.

(S.) H. G. MORISON,
Assistant Attorney General.

(S.) MYLES J. LANE,
United States Attorney.

(S.) MELVILLE C. WILLIAMS,
(per HL)

(S.) HAROLD LASSER,
Special Assistants to the Attorney General.

(S.) HAROLD J. MCAULEY,
(per HL)
Trial Attorney.

APPENDIX B

Paragraph 16(a) of Complaint, as Added thereto by Stipulation

16(a). A promoter of a professional championship fight usually derives substantially all of his revenue from two sources: (a) sale of tickets of admission and (b) sale of rights to telecast, broadcast and produce and distribute motion pictures of the fight. In such fights, sale of television, radio and motion picture rights account for a substantial proportion of the promoter's total revenue. Since 1949 sale of these rights has represented, on the average,

over 25% of the total revenue derived from championship fights, and has exceeded, in some instances, the revenue received from sale of tickets of admission. With the progressive and continuing expansion of television facilities, the proportion of the promoter's total revenue derived from television, radio and motion pictures, has been on an ascending curve, in relation to revenue derived from sale of tickets of admission. In the Marciano-Wolcott heavyweight championship fight of May 15, 1953, at Chicago, Illinois, promoted by defendants IBC (N. Y.), IBC (Ill.), James D. Norris and Arthur M. Wirtz, the promoters' receipts from sale of tickets of admission were, after federal admission taxes, $253,462.37, while their television, radio and motion picture revenue was approximately $300,000.

APPENDIX C

No. 21071

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, PLAINTIFF

against

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., A CORPORATION OF NEW YORK; INTERNATIONAL BOXING CLUB, A CORPORATION OF ILLINOIS; MADISON SQUARE GARDEN CORPORATION, A CORPORATION OF NEW YORK; JAMES D. NORRIS; AND ARTHUR M. WIRTZ, DEFENDANTS

MEMORANDUM

Civ. 74-81

(Filed Apr. 23, 1954. U. S. District Court S. D. of N. Y.)

NOONAN, D. J.:

On February 4, 1954, this court granted a motion made by the respondents to dismiss the complaint in this action for lack of jurisdiction of the subject matter of the action and for failure to state a claim upon which relief could be granted. This decision was rendered from the bench after oral argument, and an order entered February 8, 1954, pursuant to that decision, is now the subject of an appeal to the Supreme Court of the United States.

Despite the fact that the order itself states that the decision of the court was based on "* * * the summons and complaint and the Marshal's return

herein, the stipulation dated January 7, 1954 amending the complaint herein, the notice of motion dated December 2, 1953, and after hearing counsel * * *" (for both sides), the plaintiff seeks to include two other items in the praecipe. These two items, which are the subject of this motion to strike, are (1) the answers of the parties, and (2) the papers connected with an earlier motion for a preference.

Two specific problems are thus before this court: whether these two items are properly a part of the record; and, if not, whether this court has the authority to strike them.

On the first question, it is the opinion of this court that the items attacked are not properly part of the "record" for purposes of appeal. They did not form a part of the papers on which the decision was based nor was reference made to them on the argument. Although they were in the file of the case, they were never "before" the court during the course of the argument on the motion to dismiss.

The purpose of an appeal is to correct an error or errors made in the court below. In the instant case, that would entail a showing that the complaint in the action does state a claim upon which relief could be granted, and that this court does have jurisdiction over the subject matter. Unless both grounds for dismissal are found to be in error, the action must stand as dismissed.

Looking to the question of whether or not the complaint states a claim upon which relief can be granted, it is clear that neither answers, nor affidavits filed in connection with an unrelated motion, can bear out the sufficiency of the complaint. It must stand or fall on its own merits.

Both because these matters were never before this court when it was called upon to make its decision, and because they are not relevant to the sufficiency of the complaint, the inclusion of these disputed items in the praecipe is neither necessary nor proper. They do not form a material part of the record, nor do they properly reflect what occurred in this court.

Accordingly, it is the opinion of this court that the motion to strike should be granted if this court has the power so to do.

Rule 10 (2) of the Revised Rules of the Supreme Court of the United States (Title 28, U. S. Code) provides that the clerk of the lower court shall forward to the Supreme Court * * * a true copy of the material parts of the record * * *. The praecipe is authorized to enable the clerk to do so and * * * for the purpose of reducing the size of transcripts and eliminating all papers not necessary to the consideration of the questions to be reviewed * * *. The rule then goes on to incorporate by reference Sections (c), (e), and (h) of Rule 75 and Rule 76 of the Rules of Civil Procedure (Title 28 U. S. Code).

Of those portions of Rule 75 and Rule 76 of the Rules of Civil Procedure incorporated by reference into Rule 10 of the Supreme Court Rules, only Rules 75 (e) and (h) are applicable to the instant situation.

Rule 75 (e) entitled "Record To Be Abbreviated", opens with the sentence "All matter not essential to the decision of the questions presented by the appeal shall be omitted."

Rule 75 (h) is entitled "Power of Court to Correct or Modify Record" and provides that "* * *

if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

It is essentially the wording of this last paragraph on which rests the authority of this court to grant the motion to strike the disputed items from the praecipe.

In 1886, in the case of *Hoe v. Kahler,* Circ. Ct. S. D. N. Y., 27 Fed. 145, 146, the court stated, "* * * a direction of this court in a doubtful case, where the clerk is requested to insert in the transcript by one party what he is requested to leave out by the other, would seem to be proper."

In the case of *U. S. v. City of Brookhaven,* 1943, 134 F. 2d 442, 446, rehearing denied, the court, referring to the inclusion in the record on appeal of a deposition taken, but never introduced into evidence in the lower court, stated:

> "Unless someone offered it in evidence on the trial it was not evidence in the case, nor was it proper to be transmitted as such with the record on appeal. When designated by appellees to be certified and sent up as a part of such record, appellant should have applied to the district court under the first sentence of Rule 75 (h) to have the deposition excluded as not having been introduced and considered in the trial."

In the instant case, the items in dispute were not introduced or considered in the determination of the motion. The appellees have moved to strike

them from the praecipe. For all of the above reasons, the motion is granted.

So ordered.

Dated, New York, N. Y., April 22, 1954.

GREGORY F. NOONAN,
U. S. D. J.

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No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, APPELLANT

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
STANLEY N. BARNES,
Assistant Attorney General,
PHILIP ELMAN,
DANIEL M. FRIEDMAN,
Special Assistants to the Attorney General,
Department of Justice,
Washington 25, D. C.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not render a written opinion. At the conclusion of argument on appellees' motion to dismiss the complaint, the court ruled that it would grant the motion, but the reasons which it gave for this ruling were not transcribed.

JURISDICTION

The judgment of the district court was entered on February 8, 1954 (R. 13-14). The petition for appeal was presented and allowed on March 12,

1954 (R. 15-16), and probable jurisdiction was noted on May 24, 1954 (R. 25). The jurisdiction of this Court is conferred by section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTIONS PRESENTED

1. Whether, as a result of this Court's decisions in the baseball cases (*Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees*, 346 U. S. 356), the doctrine of *stare decisis* requires a holding that the business of promoting and exhibiting professional championship boxing contests is excluded from the scope of the federal antitrust laws.

2. If not, whether the allegations of the complaint are sufficient to establish that appellees' business—*i. e.*, the promotion, exhibition, broadcasting, telecasting and filming of professional championship boxing contests, on a multi-state basis—is "trade or commerce among the several States" within the meaning of sections 1 and 2 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in

restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action brought by the United States in March, 1952, under section 4 of the Sherman Act. The complaint alleges (par. 17, R. 5) that, since January, 1949, the appellees have been conspiring to restrain and to monopolize, and have monopolized, interstate and foreign trade and commerce in the promotion, exhibition, broadcast-

ing, telecasting, and motion-picture production and distribution of professional championship boxing contests, in violation of sections 1 and 2 of that Act.

Shortly after the decision in *Toolson* v. *New York Yankees*, 346 U. S. 356, appellees filed a motion to dismiss the complaint on the authority of that decision (R. 10-11; Appellees' Motion to Affirm, p. 3). Following the submission of briefs and oral argument, the district court granted the motion, and entered judgment of dismissal (R. 13-14).

The relevant facts stated in the amended complaint—admitted for the purposes of the motion to dismiss—are as follows:

The corporate appellees are International Boxing Club of New York, Inc. ("IBC(NY)"), International Boxing Club ("IBC"), and Madison Square Garden Corporation ("Garden") (pars. 3-5, R. 1-2). IBC(NY) and IBC are engaged in the promotion and exhibition of professional boxing contests, and Garden operates Madison Square Garden, the foremost sports arena in New York City (*ibid.*) There are two individual appellees, James D. Norris and Arthur M. Wirtz (pars. 6-7, R. 2), who, together with Garden, own eighty per cent of the stock of IBC(NY) and IBC (par. 8, R. 2).

A professional boxer greatly increases his earning power if he obtains recognition as "world champion" of the weight division in which he competes. He gains such title by defeating the existing cham-

pion or by eliminating all contenders, and remains champion until he is defeated by a contender, or resigns his title. Championship boxing contests are also the most remunerative for the promoter. Of the various world championships, the heavyweight division is the most lucrative (par. 11, R. 3-4).

Substantially all of the revenue which a promoter derives from championship contests comes from admission tickets and the sale of rights to televise, broadcast, and produce and distribute motion pictures of the fight.[1] Since 1949, sale of these rights has represented, on the average, more than twenty-five per cent of the receipts from championship fights. This proportion has been progressively increasing and, in some instances, receipts from sale of these rights has exceeded receipts (after Federal admission taxes) from tickets of admission (par. 16(a), R. 12).[2]

Appellees' conspiracy has consisted of a continuing agreement to exclude others from promoting championship boxing contests in the United States, and from selling television, radio, and motion-picture rights to such contests (par. 18, R. 5). In order to effectuate the conspiracy and the result-

[1] Radio and television broadcasts of such fights are transmitted "throughout" the United States, and motion pictures thereof are distributed to theatres "throughout" the country (par. 15, R. 5).

[2] In a heavyweight championship contest in May, 1953, receipts from the sale of these rights were approximately $300,000, as against approximately $250,000 from net gate receipts (par. 16(a), R. 12).

ing monopolization (par. 19, R. 5), appellees have done the following things:

(a) In January, 1949, the individual appellees and Garden agreed among themselves and with Joe Louis, then heavyweight champion of the world, that Louis would resign his title, that he would procure exclusive rights to the services of the four leading contenders for his title in a series of elimination contests which would result in recognition of a new heavyweight champion, and that he would assign these exclusive rights to appellees (par. 20, R. 6). Contracts reflecting the foregoing agreement were then entered into between a corporation in which Joe Louis owned the majority of the stock and the four leading contenders for the title, and these contracts, which also gave the corporation exclusive television, radio, and motion-picture rights to the contests (par. 21, R. 6), were assigned to IBC (par. 22, R. 6).

(b) Appellees have eliminated the "leading competing promoter" of championship matches (par. 23, R. 6).

(c) They have acquired the exclusive right to promote professional boxing contests in the "principal arenas" where championship contests can be successfully presented (pars. 24-25, R. 7).

(d) They have required each title contender to agree, as a condition of fighting for the championship, that, should he win, he would for a period of three (or sometimes five) years take part only in

title contests promoted by appellees (par. 26, R. 7-8).

(e) They have promoted, or participated in the promotion of, all but two of the twenty-one championship contests held in the United States since June 1949 (par. 27, R. 8).[3]

SUMMARY OF ARGUMENT

In our brief in *United States* v. *Shubert*, No. 36, this Term, we have set forth the reasons why we think that *Toolson* v. *New York Yankees*, 346 U.S. 356, reaffirmed *Federal Baseball Club* v. *National League*, 259 U.S. 200, only in so far as the latter held that baseball was not within the Sherman Act, and why we think it is not controlling on the applicability of the Act to any other business. In this brief, we shall merely summarize those arguments.

I

The factors which led this Court in *Toolson* to refuse to re-examine *Federal Baseball* are absent in the case of championship boxing. (1) *Federal Baseball* held only that baseball was not subject to the Sherman Act. This Court has never held that boxing is exempt from the Act. (2) Assuming *arguendo* that in 1922 the reasoning of *Federal Baseball* was also applicable to boxing, the latter business has not relied on that decision in the same sense that baseball has. After the *Federal Base-*

[3] The total receipts from these contests have been approximately $4,500,000 (par. 16, R. 5).

ball case had, as a practical matter, insulated the "reserve clause" in players' contracts from attack under the Sherman Act, organized baseball developed an elaborate "farm system" of minor-league clubs, which is dependent upon the reserve clause. Championship boxing, on the other hand, has developed no comparable organization in the past thirty years in reliance on exemption from the Act. (3) In 1951, there was extensive Congressional consideration of whether baseball should be exempt from the antitrust laws, but no consideration of whether boxing should be exempted.

The economic characteristics of the two sports, and the practical consequences of holding them subject to the Sherman Act, are markedly different. Organized baseball is a tightly integrated organization of several hundred clubs which play a great many games each season. But, unlike most businesses, the competing teams in a league must cooperate to insure that no team becomes much superior to its competitors, otherwise public interest will wane. Championship boxing is conducted on a match-to-match basis, bouts are held relatively infrequently, the business has developed no comparable organization, and there is no need to maintain similar equality of competitors. In baseball, if the challenge to the reserve clause in the *Toolson* case had been sustained, far-reaching organizational changes would have been required. Granting the relief sought by the Government in the instant case, however, would not require substantial

changes in the basic structure of championship boxing. Accordingly, there are no reasons, either legal or practical, which would justify application of the rule of *stare decisis* to preclude the Court from deciding now whether the boxing business, as conducted by appellees in the manner described in the complaint, is subject to the Sherman Act.

II

Appellees concede that broadcasting, telecasting, and making and distributing motion pi tures are interstate commerce. Championship boxing today derives an average of twenty-five per cent—and in some fights a major portion—of its revenues from the sale of radio, television, and motion-picture rights. A business which derives so substantial a portion of its income from interstate operations is engaged in interstate commerce.

The *Federal Baseball* case (considered apart from *Toolson*) is not controlling on the question whether this business is interstate commerce. That case was decided at a time when there was no commercial broadcasting or telecasting or substantial motion-picture coverage of sporting events. Today, however, such coverage of professional boxing is an integral element of, and necessary to, the successful promotion of championship contests. Appellees' argument, that the proper comparison in determining whether *Federal Baseball* is controlling is between boxing today and baseball today, misconceives the basis of decision in *Toolson*. As shown in Point I, the *Toolson* case does not hold

that the present interstate aspects of baseball are insufficient to bring it within the Sherman Act, but only that, because of baseball's reliance on *Federal Baseball* and the history of Congressional consideration, the business of baseball, regardless of how it is conducted now or how it was conducted in 1922, is outside the Act until and unless Congress decides otherwise.

The fact that appellees do not themselves broadcast, telecast, or film the fights, but merely sell the rights to do so, does not change the interstate character of their business.

ARGUMENT

Appellees' motion to dismiss the complaint was made and granted upon the authority of *Toolson* v. *New York Yankees,* 346 U. S. 356 (Motion to Affirm, p. 3). Appellees contend (*id.,* pp. 3-4) that boxing is "similar, in a" respects" to baseball, and is "indistinguishable from professional baseball, so far as the antitrust laws are concerned"; that the holding in *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200, namely, that "professional baseball was not within the scope of the Federal antitrust laws," which was followed in the *Toolson* case on the basis of *stare decisis,* is equally applicable to boxing; and that a contrary result "would require a magnification, amounting to distortion," of the "microscopic differences" between the two sports.

In our brief in *United States* v. *Shubert,* No. 36, this Term, we have set forth the reasons why we

think that the *Toolson* case reaffirmed the *Federal Baseball* case only in so far as the latter held that *baseball* was not within the Sherman Act, and why it is not controlling on the applicability of the Act to any other business. In this brief we shall merely summarize those arguments. The *Federal Baseball* case, standing alone, is not controlling on the applicability of the Act to the business of promoting professional championship boxing contests. And, unless the matter is foreclosed by the doctrine of *stare decisis,* we believe it clear that the latter business as conducted today is "trade or commerce among the several States" within the meaning of the Act.

I

This Court's Decisions in the Baseball Cases Do Not Require, Under the Doctrine of *Stare Decisis*, a Holding That the Business of Promoting Professional Championship Boxing Contests Is Excluded from the Scope of the Federal Antitrust Laws

In our brief in the *Shubert* case (No. 36, pp. 16-27), we have shown that this Court's refusal in *Toolson* to re-examine *Federal Baseball* represents solely an exceptional application of the doctrine of *stare decisis;* that this Court did not reaffirm any general "principle" laid down in *Federal Baseball,* but merely followed, "[w]ithout re-examination of the underlying issues," the narrow holding of the latter case that baseball is not subject to the antitrust laws; and that the *Toolson* case cannot be read as holding that other businesses or sports which may be comparable to baseball, in that they

involve personal performances or exhibitions for public entertainment, are also exempt from the Sherman Act. In short, in the *Toolson* case the Court did not pause to examine how the business of baseball is conducted now, or whether it differs materially from the business as it was conducted in 1922. The point of the *Toolson* case is that it decided nothing on the merits, and that—apart from its square holding that baseball is outside the antitrust laws unless and until Congress provides otherwise—no inferences can properly be drawn from it as to the Court's present views of the applicability of the Act to other businesses or sports. We also noted in the *Schubert* brief that the Court's refusal to re-examine its former decision was based on organized baseball's reliance upon the clear holding in *Federal Baseball* that it was not subject to the antitrust laws, and on the failure of Congress, which had the problem under consideration, to take action.

But these factors are not present in the case of professional championship boxing, and their absence dictates against invoking the doctrine of *stare decisis* to preclude consideration of whether, in the light of boxing's present substantial interstate aspects, that business is exempt from the Sherman Act.

In the first place, the *Federal Baseball* case held only that baseball was not subject to the Sherman Act. It did not hold, and this Court has never held, that boxing is similarly exempt.

But even assuming *arguendo* that in 1922 the rea-

soning of the *Federal Baseball* case was also applicable to professional boxing, there has been no showing that boxing did in fact rely on that decision in the same sense, or in any comparable degree, in which organized baseball did. The gravamen of the complaint in the *Federal Baseball* case was the alleged illegality of the so-called "reserve clause" in the players' contracts,[4] under which a player, once he signs his first contract with organized baseball, is precluded from ever playing for another club unless he is sold or released. H. Rep. No. 2002, 82d Cong., 2d Sess. (hereinafter cited as "Report"), p. 114. The holding in *Federal Baseball* that baseball was not interstate commerce had the practical effect of insulating the reserve clause from attack under the Sherman Act. Following that decision, organized baseball developed, at great expense, an extensive "farm system" of minor-league clubs owned or controlled by the major-league clubs (*id.*, pp. 62-74, 136, 177-189).[5] The farm system is "inextricably tied" to the reserve clause (*id.*, p. 185), and without that clause the farm system "could not exist" (*id.*, p. 183). It was this structure which organized baseball "develop[ed since

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[4] See *National League of Professional Baseball Clubs* v. *Federal Baseball Club of Baltimore*, 269 Fed. 681, 683 (C.A.D.C.).

[5] "At the time of the Federal League case the farm system, as we know it today, hardly existed, if at all." Report, p. 188. Today the major-league clubs own, or control by working agreements, 195 of the 364 minor-league clubs (*id.*, pp. 188-189). The "overriding purpose" of the farm system has been to supply the major-league clubs with new players (*id.*, p. 185); minor-league baseball has been relatively unprofitable (*id.*, pp. 96-97).

1922], on the understanding that it was not subject to existing antitrust legislation." *Toolson* case, p. 357.

Professional boxing, on the other hand, appears to have undergone little, if any, structural change since 1922, and it cannot point to any comparable organization which it has created in the past thirty years in reliance on exemption from the Sherman Act. Indeed, the restrictive practices upon which this suit is based were instituted only five and one-half years ago (pars. 17, 20-23, R. 5-7), and they involved only competitive practices, not the basic structure of the business. In short, there is no evidence that the boxing business—as distinguished from the particular restrictive activities of appellees—has ever "relied" upon any understanding, based on an authoritative decision of this Court, that it has been and would continue to be exempt from the antitrust laws.

The third factor upon which the Court relied in *Toolson* as a reason for not re-examining *Federal Baseball*—Congressional consideration—is also conspicuously absent in the case of boxing. In 1951, three identical bills were introduced in the House[6] for the purpose of protecting organized baseball from impending private litigation under the Sherman Act. (Report, p. 1.) Although these bills provided an exemption from the antitrust

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[6] H.R. 4229, 4230, 4231, 82d Cong., 2d Sess. A companion bill, S. 1526, was introduced in the Senate, but no hearings were held thereon.

laws for "organized professional sports enterprises or to acts in the conduct of such enterprises," the extensive hearings which a House subcommittee held on the bills related solely to "whether or not *organized baseball* should be exempted from the operation of the antitrust laws." (Hearings before the House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, Organized Baseball, 82d Cong., 1st Sess., p. 1 (emphasis added). Similarly, the subcommittee's lengthy report, which recommended that no legislation be enacted, dealt solely with organized baseball. (Report, *passim.*) This, presumably, was the consideration by Congress which the Court had in mind in *Toolson*, and since such consideration did not cover boxing it affords no basis for exempting the latter from the Sherman Act.

In determining whether there are practical reasons for applying the doctrine of *stare decisis* here, so that the exemption from the antitrust laws which baseball now has (as a result of the reaffirmance of *Federal Baseball* in *Toolson*) should be extended to boxing, the inherently different economic characteristics of the two sports should also be borne in mind. Organized baseball is a tightly integrated organization of 382 clubs (grouped into two major and forty-nine minor leagues) (Report, pp. 12-15, 229), which play many games each season (*id.*, p. 98). But, unlike most businesses, successful baseball operation requires that the competing teams cooperate with each other to insure that no one team attains too great superiority over its com-

petitors (*id.*, p. 212, 229).[7] For, unless all teams in the league are of relatively equal playing ability, public interest soon wanes (*ibid.*). "* * * [S]ingle exhibitions, however closely contested, do not maintain public interest unless they are a part of a larger drama—the quest for a championship." (Note, 62 Yale L. J. 576, 628.) The reserve clause, which has been described as the "keystone of the entire structure of professional baseball" (Report, p. 228), is designed to achieve this equality among clubs, for by tying players to particular teams it prevents the wealthier clubs from buying up all the leading players (*id.*, pp. 105, 208).

Championship boxing, on the other hand, is conducted on a match-to-match basis. It requires "no team organization, continuous employment, or cooperation among employers. The promoter can produce the entire exhibition by himself, hiring both or all of the skilled performers necessary for the match." (Note, 62 Yale L.J. 576, n. 268, p. 630.) Boxing has developed no organization comparable to that in baseball. Championship bouts are held relatively infrequently,[8] and a particular fighter's

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[7] In the early days of organized baseball, the inequality between the teams often was striking. In 1875, for example, the winning team, which had a "corner on the playing talent," won seventy-one games and lost eight, the runner-up team had a record of 53-20, and the last-place team won only two out of forty-four games (Report, p. 19).

[8] During the 33-month period June, 1949, to March, 1952, there were only twenty-one professional championship boxing contests in the United States (par. 16, R. 5).

protracted pre-eminence over all contenders apparently does not destroy public interest."

Thus, unlike the reserve clause in baseball, there is no basis for assuming that the restraints which appellees have imposed on championship boxing can trace their genesis and growth to any decision of this Court. Furthermore, in the *Toolson* case the complaint challenged the reserve clause, and if the challenge had been sustained, far-reaching changes in baseball's organization would have been required,[10] and substantial investments in the farm system might have been jeopardized. The instant case, on the other hand, merely seeks to restore the competitive situation as it existed prior to 1949, and granting of the relief which the Government asks would not substantially change the basic structure of the business, whatever effects it may have on the appellees' particular restrictive practices.

To summarize:—*Toolson* reaffirmed *Federal Baseball* only in so far as the latter held that *baseball* was not subject to the antitrust laws; the reasons which led this Court to refuse to re-examine

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[9] Joe Louis held the world's heavyweight championship for more than eleven years, during which period he successfully defended his title twenty-five times. World Almanac, 1954, p. 846.

[10] Respondents in the *Toolson* case argued that if the *Federal Baseball* case were overruled, "the present organization which has brought the sport to its present great popularity could not continue," and the resulting uncertainty "would undoubtedly result in the wrecking of the present organization of the game." Brief for respondents, No. 18, 1953 Term, pp. 66-67. See also brief for respondents in the companion case, No. 23, 1953 Term, p. 69.

Federal Baseball in the case of baseball are not present in boxing; the economic characteristics of the two sports, and the practical consequences of holding them subject to the Sherman Act, are markedly different. Accordingly, the Court should not consider itself precluded by any prior decision from examining on its merits the question of statutory construction here presented for the first time, namely, whether the business of promoting professional championship boxing, as it is conducted today, is interstate commerce within the Sherman Act. In Point II, *infra*, we shall show that it clearly is.

II

The Business of Promoting Professional Championship Boxing Contests Is "Trade or Commerce Among the Several States" Within the Sherman Act

Appellees concede (Motion to Affirm, p. 9), as indeed they must, that broadcasting, telecasting, and making and distributing motion pictures are interstate commerce. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279 (radio); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223 (radio); *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (radio); *Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 154 (C. A. 3), certiorari denied, 340 U. S. 929 (television); *United States* v. *Paramount Pictures*, 334 U. S. 131 (motion pictures). Championship boxing today derives an average of twenty-five per cent—and in some fights a major portion—of its revenues from the sale of

radio, television, and motion-picture rights (see *supra*, p. 5). A business which derives so substantial a percentage of its income from interstate operations is, beyond question, itself engaging in interstate commerce. Cf. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225-226; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 602, n. 11, 610.[11]

The *Federal Baseball* case (considered apart from *Toolson*) is not controlling on the question of whether this business is interstate commerce within the Sherman Act. The rationale of that decision was that baseball games were purely local affairs, and that the interstate transportation of the players and equipment was "a mere incident, not the essential thing" (259 U. S. at 209). At that time, however, there was no commercial broadcasting or telecasting of sporting events, or widespread distribution of motion pictures thereof.[12] Today, radio, television, and motion-picture coverage of professional boxing is an integral element of, and necessary to, the successful promotion of championship contests. If the allegations of the com-

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[11] Plainly, the promotion of championship boxing contests is "trade or commerce" within the Sherman Act. See *Shubert* brief, pp. 28-31.

[12] Although the record in the *Federal Baseball* case does show that the major leagues sold the rights to transmit telegraphic play-by-play descriptions of the games, it does not appear that this was a significant or material element of the baseball business as then conducted. Indeed, the telegraphic reports are not even mentioned in the opinion of this Court or of the court of appeals (269 Fed. 681).

plaint are established by the evidence—and the Government, it is submitted, should not be denied the opportunity to present its proof of these allegations—these interstate aspects of the business no longer are "a mere incident" of the local contest, but must be deemed to have "rise[n] to a magnitude that requires it [them] to be considered independently," *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, 274, in determining the applicability of the Sherman Act. Accordingly, as in *Hart*, this case should be permitted to go to trial on these issues. The district court erred in ruling, as a matter of law, that the complaint failed to state violations of the Act. Cf. *United States* v. *Employing Plasterers Association*, 347 U. S. 186.

Appellees argue (Motion to Affirm, pp. 6-7), however, that the proper comparison for determining whether *Federal Baseball* is controlling is not between baseball as it was conducted in 1922 and boxing as now conducted, but between baseball today, "as it was presented to this Court in the *Toolson* case," and boxing today, "as presented in the complaint"; and that such comparison shows that professional boxing today has "considerably fewer" interstate aspects than baseball. This argument, as has been shown (*supra*, pp. 11-18), misconceives the basis of decision in *Toolson*. The *Toolson* case does not hold, as appellees would read it, that the present interstate aspects of baseball are insufficient to bring it within the scope of the Sherman Act. Indeed, that was the precise issue which this

Court refused to re-examine in *Toolson* because of its application of the doctrine of *stare decisis*, and that was the issue which the dissenting Justices in *Toolson* would have reached and would have decided in favor of Sherman Act appl. ability. See 346 U. S. at pp. 357-365. *Toolson* holds only that, because of organized baseball's development in reliance on the *Federal Baseball* case and the history of Congressional study, the Court would not re-examine the issue whether, in the light of baseball's present interstate operations, that business now is interstate commerce. It cannot be read as holding that, if the matter were re-examined, baseball would be held free of the Sherman Act, or that other sports which may be comparable to baseball are also exempt from the Act.[13] If additional exemptions from the Act are to be given, "they must come from the Congress, not this Court." *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 561.

Appellees further argue (Motion to Affirm, p. 9) that, although broadcasting, telecasting, and making and distributing motion-picture films may be interstate commerce, they are not engaged in such activities, since they merely sell the rights to do so. But the sale of these rights is the first step in, and

[13] The recent case of *Shall* v. *Henry*, 211 F.2d 226 (C.A. 7), upon which appellees rely (Motion to Affirm, p. 4), similarly misinterprets the *Toolson* case. The *Shall* case held that a complaint charging a conspiracy in restraint of professional boxing did not state a cause of action, since "a profession of boxing contest is not to be distinguished legally from that of a professional baseball game" (p. 229).

an integral part of the subsequent transmission of visual and aural images of boxing contests across state lines. The sale of goods in one state for transportation to another state is just as much interstate commerce as the subsequent interstate transportation. *Currin* v. *Wallace*, 306 U. S. 1, 10, and cases there cited, and the same principle should govern the sale of rights to interstate transmission. Cf. *Gardella* v. *Chandler*, 172 F. 2d 402, 407-408 (C.A. 2) (opinion of Judge Learned Hand).

Furthermore, the interstate transmission is an integral element of the contests themselves, cf. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, and in determining the interstate character of appellees' business it is immaterial whether appellees themselves broadcast and film the contests, or designate others to do so. "[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U. S. 375, 398.

Appellees also contend (Motion to Affirm, p. 10) that any monopoly which a promoter has of the radio, television, and film rights to a particular contest "is inherent in the unique character of the event," and does not result from excluding others from the field "since there are no others who can have rights in that contest." This argument confuses the monopoly which a promoter always has of the particular contest he is promoting—a monopoly not unlike that of the owner of the only motion-

picture theatre in a town, cf. *United States* v. *Griffith*, 334 U. S. 100, 106—with appellees' monopolization of the entire business of promoting championship contests. It is by virtue of this monopoly power over the whole industry that appellees are able to exclude others from the broadcasting and filming of the championship contests. And this interstate broadcasting and filming is, as we have noted, a vital and necessary part of the business as it is conducted today.

CONCLUSION

The judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

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AUGUST, 1954.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 53

UNITED STATES OF AMERICA,

Appellant,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., A CORPORATION OF NEW YORK; INTERNATIONAL BOXING CLUB, A CORPORATION OF ILLINOIS; MADISON SQUARE GARDEN CORPORATION, A CORPORATION OF NEW YORK; JAMES D. NORRIS; AND ARTHUR M. WIRTZ,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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CHARLES H. WATSON,
RALPH M. MCDERMID,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 729

UNITED STATES OF AMERICA,

Appellant,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., A CORPORATION OF NEW YORK; INTERNATIONAL BOXING CLUB, A CORPORATION OF ILLINOIS; MADISON SQUARE GARDEN CORPORATION, A CORPORATION OF NEW YORK; JAMES D. NORRIS; AND ARTHUR M. WIRTZ,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CIVIL ACTION NO. 74-81

Appellees move the Supreme Court of the United States, pursuant to Rule 7, paragraph 4 and Rule 12, paragraph 3, of its Revised Rules, that the final judgment of the District Court be affirmed, or, in the alternative, that the appeal be dismissed.

The ground of the motion is that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

Opinion Below

There was no opinion below. Appellees' motion to dismiss the complaint was granted at the conclusion of oral argument. The remarks of the Court (Hon. Gregory F. Noonan, D. J.) in connection with the granting of the motion were not transcribed.

Proceedings Below

The Allegations of the Complaint

The complaint alleges, in substance: that the appellees Madison Square Garden Corporation (Garden), James D. Norris and Arthur Wirtz are stockholders in the two other corporate appellees, International Boxing Club of New York, Inc. (IBC (N. Y.)) and International Boxing Club Inc. (IBC (Ill.)); that while the voting power in IBC (N. Y.) and IBC (Ill.) is, roughly speaking, evenly divided between the Garden, on the one hand and Wirtz and Norris, on the other hand, the main financial interest in IBC (N. Y.) is owned by the Garden and the main financial interest in IBC (Ill.) is owned by Wirtz and Norris (Complaint Pars. 8 and 9); that through stock ownership, leases and agreements, the appellees have the exclusive right to lease for the promotion of professional boxing contests certain outdoor stadia and indoor arenas in New York, Chicago, Detroit and St. Louis; that through the employment of so-called "return match"[1] and "exclusive service"[2] contracts,

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[1] Return match contracts provide that if the contender, in a championship boxing contest, should win, thereby gaining recognition as champion, he will engage in a return bout with the former champion, thereby giving the latter an opportunity to regain the title.

[2] Exclusive service contracts provide that the boxer in question will,

coupled with control of the above mentioned stadia and arenas, 19 out of the 21 professional championship boxing contests presented in the United States between June, 1949 and March, 1952 were promoted [3] by appellees or with the participation of appellees; and that it follows that defendants have a monopoly of the promotion of professional championship boxing contests and the various "by-products" thereof.

Argument

THE DECISION OF THIS CASE IS GOVERNED BY THE RECENT DECISION OF THIS COURT RELATING TO PROFESSIONAL BASEBALL.

Appellees' motion to dismiss the complaint was based squarely on the decision of this court in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953). In that case this Court held that the doctrine of *stare decisis* required adherence to the proposition, established in *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), that professional baseball was not within the scope of the Federal antitrust laws. The argument made before the District Court and to be made here is, very simply, that professional boxing is indistinguishable from professional baseball, so far as the antitrust laws are concerned. The *Federal Baseball Club* case talked in terms of local exhibitions, of which interstate travel was only an incident. That the *Federal Baseball Club*

during a specified period, engage only in boxing contests promoted by the other contracting party, except with the consent of such party. Provisions relating to exclusive services are sometimes included in "return match" contracts. As shown by the *Toolson* case, the exclusive rights of one baseball team to the services of its players is the foundation of the whole structure of organized baseball.

[3] The promotion of a boxing contest involves in essence, as indicated by the complaint (Par. 13), contractual arrangements with the two boxers involved in the principal contest, arranging for the locale of the contest, arranging the preliminary contests, and, where sufficient interest exists, the sale of radio, television, motion picture or other rights to the contest.

case thereby established a principle and is not to be limited to professional baseball, is evidenced by its citation, without any such limitation, in numerous cases dealing with the field of entertainment.[4] The instant case, however, deals with a competitive sport which is similar, in all respects, to baseball and which, therefore, is much closer on the facts than cases dealing with, for example, vaudeville act bookings. Since a boxing bout, like baseball, is a purely local exhibition, (in connection with which the use of interstate travel or communication is much less important than in baseball) the principle laid down in the *Federal Baseball Club* case and adhered to, on the basis of *stare decisis*, in the *Toolson* case, must be applicable here; any different result would require a magnification, amounting to distortion, of the microscopic differences between professional baseball and professional boxing.

Our contention that the *Federal Baseball Club* case established a principle of general applicability and is not, as appellant here contends, to be limited to baseball, is supported by decisions handed down since the decision of this Court in the *Toolson* case. In *Shall* v. *Henry et al.*, 211 F. 2nd (March 5, 1954), 237 the Court of Appeals for the Seventh Circuit dismissed the complaint in a treble damage suit involving some of these appellees and substantially the same allegations. In *U. S.* v. *Lee Shubert et al.*, 120 F. Supp. 15 (S. D. N. Y., December 30, 1953), Judge Knox dismissed the complaint in an antitrust action involving legitimate theatre productions. In the instant case, the Court below, in dismissing the complaint, must have rejected the argument made by counsel for appellant seeking to confine the *Toolson* case to professional baseball. In *U. S.* v *National Football League, et al.*, F. Supp. (E. D.

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[4] E.g. *Hart* v. *Keith Exchange*, 262 U. S. 271; *Ring* v. *Spina*, 148 F. 2d 267, *Conley* v. *San Carlo Opera Co.*, 163 F. 2d 310.

Pa., November 12, 1953) Judge Grim distinguished the *Toolson* case, but did so on grounds which clearly showed that he did not see any distinction between professional baseball as such and professional football.

A. *Professional Boxing, Like Baseball, Was Entitled to Rely, and Has Relied, on the Federal Baseball Club Case*

That professional boxing was entitled to rely on the decision in the *Federal Baseball Club* case clearly appears from the following statement contained in the decision of the Circuit Court of Appeals in that case,[5] to which statement we have taken the liberty of adding boxing terminology in brackets to demonstrate the complete applicability of the language used:

> "The business in which the appellants were engaged, as we have seen, was the giving of exhibitions of baseball [boxing]. A game of baseball [boxing bout] is not susceptible of being transferred. The players [contestants], it is true, travel from place to place in interstate commerce, but they are not the game [bout]. Not until they come into contact with their opponents on [in] the baseball field [ring] and the contest opens does the game [bout] come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. The exertions of skill and agility which they witness may excite in them pleasurable emotions, just as might a view of a beautiful picture or a masterly performance of some drama; but the game [bout] effects no exchange of things according to the meaning of 'trade and commerce' as defined above." (269 Fed. 681, at pp. 684, 685).

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[5] It is proper to direct attention to the opinion of the Circuit Court of Appeals because this Court, in affirming the decision below, characterized the opinion below as going "to the root of the case" (259 U. S. 200 at p. 208).

The foregoing quotation shows the criteria used to establish the principle laid down in the *Federal Baseball Club* case; those criteria were obviously as applicable to professional boxing. That being so, professional boxing, in its development since 1922, has been entitled to, and did, rely on the *Federal Baseball Club* decision.

B. *Boxing and Baseball as Presently Conducted are Indistinguishable From the Standpoint of the Anti-trust Laws.*

As appears from an examination of the complaint, it may be said that professional championship boxing is to boxing generally what major league professional baseball is to baseball as a whole; professional championship boxing is, however, a mere sideshow compared to major league baseball, from the standpoint of participants involved, customers attracted, investment required, and dollar receipts from all sources. For instance, there can be, by definition, only eight professional boxing champions at any one time (Complaint, Par. 11) whereas the sixteen major league baseball teams will have at least 400 players under direct contract at all times. According to the dissenting opinion of this Court in the *Toolson* case, major league gross revenues for the year 1950 were over $32,000,000, whereas gross receipts of championship boxing matches over a three year period (Complaint, Par. 16) were only $4,500,000, or at the rate of $1,630,000 per year. It is apparent, therefore, that the public interest in boxing, emphasized here by appellant (Statement, pp. 10, 11) is, when measured by the business criterion of dollar receipts, only one-twentieth as much as the public interest in major league baseball.

Appellant confuses the issue by comparing baseball as it was conducted in 1922 with boxing as it is conducted in the present era of radio and television (Statement pp. 7-10).

The proper comparison, of course, is between professional baseball today, as it was presented to this Court in the *Toolson* case, and boxing today, as presented in the complaint. Such a comparison shows clearly that professional boxing as presently conducted has considerably fewer aspects of interstate trade or commerce than baseball as it is presently conducted; and the same was necessarily true of boxing in 1922 as compared with baseball in 1922. Baseball, as has been noted in both the *Federal Baseball Club* and the *Toolson* cases, requires a planned pattern of interstate movement of personnel and equipment on the part of the teams involved; boxing contests, on the other hand, are between two individuals, whose skill and personality, rather than place of origin, are significant in eliciting interest in the contest. The impact and effect of radio, television, motion pictures and other modern methods of communication upon boxing are not basically or essentially different from their impact and effect on baseball.[6]

A boxing promoter, like the owner of a baseball club, is dependent for his receipts upon public interest in the contests he presents. That interest is primarily represented by the purchase of tickets of admission to the contest. There are, however, as in baseball, corollary sources of revenue to be tapped in reaching those members of the public who do not purchase tickets of admission but who can be induced to watch or listen to, through television, motion pictures or radio, a simultaneous or delayed presentation of the contest. Seeking to avoid the *Toolson* decision, appellant emphasizes the allegation of the complaint that receipts from the sale of motion picture, radio and television rights amount to approximately 25% of the

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[6] The dissent in the *Toolson* case characterizes the "sharp increase" in radio and television receipts as "continuing." Compare the allegations of Paragraph 16(a) of the Complaint in the instant case.

gross receipts of boxing (Statement, p. 5). But the complaints in the *Toolson* and companion cases contain substantially similar allegations.[7] The dissenting opinion in the *Toolson* case shows that major league baseball derives more money in one year from radio and television than professional championship boxing derived from all sources during the three year period covered by the instant complaint. The ambit of the antitrust laws, and the determination of whether the courts or Congress should expand that ambit, cannot hinge upon what can only be a trifling difference in degree.

Appellant also attempts to distinguish the *Federal Baseball Club* and *Toolson* cases on the ground that the basic issues presented in both cases were the tightly integrated structure of professional baseball as exemplified by the various intra-league and inter-league agreements and the use of the so-called "reserve clause" in players' contracts. But this alleged distinction is merely the coincidental result of the fact that those cases were commenced by individuals, who, quite naturally, complained only of the particular effects of baseball's agreements upon their own activities and interests. Both cases nevertheless required a decision as to whether or not the agreements producing the results complained of were within the scope of the antitrust laws. The instant case, being a suit by the United States rather than a private treble damage action, seeks much more sweeping relief than would have been appropriate to the

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[7] The *Toolson* complaint (Par. 14) alleges that radio and television receipts of baseball exceeded $1,000,000 per year and exceeded 20% of the net profits of baseball each year. In both the *Kowalski* and *Corbett* cases the complaints alleged (*Kowalski* complaint, Par. 31, 32, and *Corbett* complaint, Par. XXI, XXII) that radio and television receipts in the All Star Game exceeded the gate receipts therefor and that World's Series radio and television receipts of $975,000 in 1950 exceeded the gate receipts therefor.

individual plaintiffs in the baseball cases, but the degree or nature of the relief requested cannot affect the fundamental question of whether or not the activities complained of are within the scope of the Sherman Act.

A further attempted distinction of the instant case is contained in the argument that the complaint here alleges a monopoly of telecasting and broadcasting and of making and distributing motion pictures, all of which activities, it is claimed, are clearly interstate commerce. No doubt broadcasting, telecasting, and making and distributing motion pictures are activities which, as such, have been held to be in interstate commerce. Appellant's argument, however, overlooks the fact that appellees are not engaged in any of these businesses. A promoter sells the rights to broadcast, televise, or film a boxing contest; as long as the purchaser of those rights pays the promoter's price, the promoter has no interest in whether or not the contest is actually broadcast, televised or filmed. Appellant might as well argue that a college which sells radio or television rights to its football games thereby engages in the radio or television business; or that by permitting newspaper reporters to attend its football games, for the purpose of publishing stories of the games, a college engages in the newspaper business.

Appellant's entire argument fails to recognize that each boxing contest, like each baseball game, is *sui generis*. It does not resemble an ordinary commodity of trade or commerce which can be mass-produced by the million. Each boxing contest is unique; it will never be duplicated, no matter how often the same two contestants may meet. Only a very few championship contests are possible during a given year,[8] and the amount of public interest which can

[8] For example, as alleged in the complaint, Par. 27, there were only 21 championship fights in the three year period preceding the institution of this action.

be evoked by a particular contest will depend on a number of intangible or unpredictable factors, including the weather, the time of year, the locale, the existence of competing athletic events of other kinds, and even the national origin of the contestants involved. It is the fact, however, that once a promoter has executed contracts with the contestants, he is the owner of the particular contest involved, with the right as a matter of property and not by virtue of any agreements with any other promoter, to exploit the contest to its fullest extent. He may determine what admission prices to charge and whether or not to sell the byproducts such as radio, television and motion picture rights, and at what prices, and his determination in any of these matters is absolutely final. Any monopoly which a boxing promoter has of the radio, television and motion picture rights of the contest being promoted is inherent in the unique character of the event; if is not in any way dependent upon or obtained by excluding others from the field, since there are no others who can have rights in that contest. Under a fair reading of the *Toolson* case, the boxing contests themselves are not within the Sherman Act. It must follow, therefore, that the exercise of property rights arising out of the promotion of such contests must likewise be outside the scope of such Act.

Since it is clear that the *Toolson* case requires affirmance here, there is no need to subject the parties to the expense, and this Court to the time, involved in achieving such affirmance on the regular docket. This Court, in the *Toolson* case, in effect determined not to change the legal rules of baseball in the middle of the game; if *stare decisis* means anything, it must mean that professional boxing is entitled to the same treatment as professional baseball.

Conclusion

The judgment of the District Court should be affirmed or, in the alternative, the appeal of the appellant should be dismissed as insubstantial.

Respectfully submitted,

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Of Counsel.

MARCH 26, 1954.

Supreme Court of the United States

OCTOBER TERM, 1954

No. 53

UNITED STATES OF AMERICA,
Appellant,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., a corporation of New York; INTERNATIONAL BOXING CLUB, a corporation of Illinois; MADISON SQUARE GARDEN CORPORATION, a corporation of New York; JAMES D. NORRIS; and ARTHUR M. WIRTZ,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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UNITED STATES OF AMERICA, *Appellant*, *v.* INTERNATIONAL BOXING CLUB OF NEW YORK, INC., a corporation of New York; INTERNATIONAL BOXING CLUB, a corporation of Illinois; MADISON SQUARE GARDEN CORPORATION, a corporation of New York; JAMES D. NORRIS; and ARTHUR M. WIRTZ, *Appellees*.	No. 53

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Appellees, International Boxing Club of New York, Inc. and Madison Square Garden Corporation, and appellees, International Boxing Club, Inc., James D. Norris and Arthur M. Wirtz, although represented by separate counsel, for the convenience of the Court have joined in this brief urging affirmance of the dismissal below.

Opinion Below

The District Court did not render a written opinion. At the conclusion of argument on appellees' motion to

dismiss the complaint, the Court granted the motion on the authority of the decision in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356, *rehearing denied*, 346 U. S. 917 (1953), on which the motion was based (R. 10, 11). The statements which the Court made in announcing its ruling were not transcribed.

Question Presented

Whether, in view of the holdings in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922) and the *Toolson* case—that Congress had no intention of including the business of baseball within the scope of the federal antitrust [illegible]s—there is any basis for the imputation of a contrary intent to Congress with respect to the analogous occupation of promoting and exhibiting professional championship boxing contests, an activity which, as in the case of baseball, includes, as one of its incidents, the sale of radio, television and motion picture rights thereto.

Statement

Background of the Litigation Affecting Professional Sports

The decision in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922) had been the law for more than twenty-five years before its continuing validity was challenged for the first time in the decision by a divided court in *Gardella* v. *Chandler*, 172 F. 2d 402 (C. A. 2, 1949). The opinions in that case, one of which cast considerable doubt on the

continued vitality of the *Federal Baseball* case (172 F. 2d 402 at p. 409), led to the filing of additional treble damage actions against baseball.[1]

The filing of the complaint in the instant case, in March, 1952, was preceded by a grand jury investigation. Shortly before the commencement of this case, an action was filed by the Government against the National Football League, limited, however, to restrictive agreements among the club owners relating solely to radio and television broadcasts.[2] The institution of those actions apparently represented the first attempts by the Government to obtain a judicial determination that the *Federal Baseball* decision was no longer the law and also the first instance in which the Government, since the passage of the Sherman Act in 1890, had instituted any action claiming that the conduct of athletic contests, professional or amateur, were within the ambit of the antitrust laws.

In filing the complaint herein, the Government no doubt considered the fact that if this Court were to hold that the promotion of boxing matches—which are individual contests of physical skill conducted under close supervision by state or local governmental regulatory bodies—was intended by Congress to be within the antitrust laws, all organized sports, including baseball, could ultimately be brought within them. That would result from the simple process of argu

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[1]House Report 2002, 82nd Congress, 2nd Session, submitted May 27, 1952, (cited by the Government in a number of places in its brief and hereinafter called the Report) at p. 1-2 refers to the fact that the bills introduced to exempt organized professional sports from the antitrust laws had been prompted by the existence of eight suits against organized baseball asking damages totaling several millions of dollars.

[2]See *United States* v. *National Football League*, 116 F. Supp. 319 (E. D. Pa. 1953). The time for appeal from the decision in that case has expired. Appellees do not regard this case as apposite here, and we note that it is not referred to in the Government's brief.

ment from the lesser to the greater and the application of the doctrine of *stare decisis,* without the possible embarrassment of a frontal attack upon the national pastime of baseball and the decision of this Court in the *Federal Baseball* case.

Before the instant case had proceeded beyond joinder of issue, writs of certiorari were granted by this Court in the *Toolson* and companion cases and those cases were argued at the October, 1953, Term. This Court, in its decision, reaffirmed the continuing validity of the *Federal Baseball* decision.

The Court's decision in the *Toolson* case was applied as a controlling precedent by the District Court in this case. It has been similarly applied by other courts in cases involving boxing, which cases will be hereinafter discussed, as well as by Judge Knox, of the Court below in *United States* v. *Shubert,* 120 F. Supp. 15 (S. D. N. Y. 1953), a case concerning professional theatrical productions which, by request of appellant, is to be argued here immediately prior to this case.

Professional sports in general and boxing and baseball in particular are sufficiently similar, as will be more fully developed below, to require, under the doctrine of *stare decisis* and related considerations, that the *Federal Baseball* and *Toolson* cases be applied to the entire field of sports, thus making it unnecessary for us to discuss the application of these decisions in any other field.

The Complaint

International Boxing Club of New York, Inc. (I. B. C. (N. Y.)) is a New York corporation licensed by the New York State Athletic Commission to promote boxing con-

tests in the State of New York (R. 1)[3] Madison Square Garden Corporation owns 80% of the stock representing the substantial financial interest in I. B. C. N. Y. (R. 2-3). International Boxing Club, Inc. (I. B. C. Ill.) is an Illinois corporation licensed to promote boxing contests in that State (R. 1).[4] Messrs. Norris and Wirtz own 80% of the stock representing the substantial financial interest in I. B. C. Ill. (R. 2-3). I. B. C. N. Y. and I. B. C. Ill. have a common set of directors and the voting power of their stock is divided so that Madison Square Garden, Wirtz and Norris have approximately 80% and Joe Louis Barrow, the former heavyweight champion, has approximately 20% (R. 2-3).

The further allegations are (R. 5-8) that through stock ownership, leases and agreements, the appellees have the exclusive right to lease for the promotion of professional boxing contests two outdoor stadia and five indoor arenas in New York, Chicago, Detroit and St. Louis which, according to the appellant, are the principal arenas where championship contests can be successfully promoted[5]; that through the employment of so-called "return match"[6] and "exclusive service"[7] contracts, coupled with control of the

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[3]Under New York law, only a domestic corporation can be licensed to promote boxing matches. N. Y. Unconsol. Laws § 9108(1) (1953), 1920 Session Laws Ch. 912.

[4]Illinois law, like New York law, requires the existence of a domestic corporation for the issuance of a license to promote boxing. Ill. Rev. Stat. Ch. 10 4/5, § 12 (1953).

[5]This allegation of the complaint contrasts sharply with the statement in the brief of the *amicus curiae* here (pp. 3, 4) that there are "suitable arenas in most of the important cities".

[6]Return match contracts provide that if the contender, in a championship boxing contest, should win, thereby gaining recognition as champion, he will engage in a return bout with the former champion, thereby giving the latter an opportunity to regain the title.

[7]Exclusive service contracts provide that the boxer in question will, during a specified period, engage only in boxing contests promoted by the other contracting party, except with the consent of such party. Provisions relating to exclusive services are sometimes in-

above mentioned stadia and arenas, 19 out of the 21 professional championship boxing contests presented in the United States between June, 1949 and March, 1952 were promoted[8] by appellees or with the participation of appellees; and that it follows that defendants have a monopoly of the promotion of professional championship boxing contests and certain "by-products" thereof, namely, the sale of radio, television and motion picture rights thereto. It is appropriate to note here that the allegations of the complaint relating to the monopoly of appellees, and the effects thereof, particularly with respect to radio and television, are considerably less comprehensive than those contained in the *Toolson* case with respect to baseball.[9]

SUMMARY OF ARGUMENT

The appellees find no basis in the *Toolson* re-affirmation of the *Federal Baseball* decision for the supposition that this Court gave, or imputed to Congress an intent to give, to professsional baseball—the largest, most highly organized and most widespread professional sport in the United States—a special immunity which was to be denied to those conducting other professional sports of similar character but of lesser stature. When this Court has found, as it did in the *Toolson* case, that Congress did not intend to

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cluded in "return match" contracts. As shown by the *Toolson* case, the analogous exclusive rights of one baseball team to the services of its players is the foundation of the whole structure of organized baseball.

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[8]The promotion of a boxing contest involves in essence, as indicated by the complaint (par. 13, R. 4), contractual arrangements with the two boxers involved in the principal contest, arranging for the locale of the contest, arranging the preliminary contests, and, where sufficient interest exists, the sale of radio, television, motion picture or other rights to the contest.

[9]See *Toolson* record, pp. 8, 12-14, 36-40.

include one sport within the antitrust laws, and it is clear that other sports have received no intimation that Congressional intent as to them might be different, fair administration of principles of stability of the law is called for. That requires that the logical implications of the decisions of this Court with respect to baseball should not be disregarded and other sports suddenly subjected to the chaos, litigation and confusion which baseball would have faced had this Court elected in the *Toolson* case not to adhere to its prior decision.

The Government's entire argument depends upon the novel theory that when this Court, in the *Toolson* decision, reaffirmed the continuing validity of the *Federal Baseball* case, it somehow limited the former prospectively and deprived the latter retrospectively of their normal roles as precedents except in the specific instance of professional baseball. Appellant urges, in effect, that the applicability of *stare decisis* to these particular decisions is dependent upon a showing equivalent to that necessary to establish a specific estoppel, a restriction which is alien to the fundamental concept of *stare decisis*.

ARGUMENT

I

THERE IS NO MORE BASIS FOR THE IMPUTATION TO CONGRESS OF AN INTENT TO BRING THE PROMOTION AND EXHIBITION OF PROFESSIONAL CHAMPIONSHIP BOXING CONTESTS WITHIN THE SCOPE OF THE FEDERAL ANTITRUST LAWS THAN THERE WAS AS TO BASEBALL.

Our basic argument is that since professional boxing is and always has been indistinguishable from professional

baseball, in all material aspects of the manner in which it is conducted, the decisions relating to professional baseball must be treated as governing professional boxing.

The basis of this Court's decision in the *Toolson* case was that "Congress had no intention of including the business of baseball within the scope of the Federal antitrust laws". (346 U. S. 356, 357) Professional boxing, like professional baseball, involves a contest of strength and skill; each boxing bout, like each baseball game, is unique and will never be duplicated even as to ultimate outcome, despite the fact that the same contestants may meet more than once. Boxing, however, obviously does not have and never has had as many interstate contacts as professional baseball, which requires, at least in the major leagues, planned interstate movement of teams to fulfill the annual schedule, southern spring training camps, a gradual northern trek of the teams in the early spring, hundreds of players from literally every state and many from foreign countries and a huge movement of equipment and supplies of all sorts.[10]

Boxing is by comparison a minor sport. The Report (p. 90), while ignoring boxing completely, gives attendance receipts for various forms of "spectator amusements", including professional baseball, football, hockey, horse and dog tracks, and college football. The comparable figures for boxing (R. 5), show that boxing as a whole, and championship boxing in particular, are poor relations. In a thirty-three month period (1949-1952) (R. 5) boxing is alleged to have drawn $15,000,000 overall, and championship boxing only $4,500,000. Professional baseball in only two of the same years (1949 and 1950) drew over $121,-

[10]The Report (pp. 4-7) discusses at length the interstate aspects of baseball and concludes (p. 7) that "Congress has jurisdiction to investigate and legislate on the subject of professional baseball."

000,000, professional football almost $17,000,000, and professional hockey $14,000,000, while college football and other amateur spectator sports were drawing $208,000,000 and $115,000,000 respectively.

The relationship of radio and television to boxing has been precisely the same as to baseball (as this Court considered it in the *Toolson* case) and to other types of athletic contests.[11] The public interest in the result, which is the nub of an athletic contest, has always placed a premium on the speed of disseminating information as to the progress of the contest. Prior to the advent of radio or television, for example, there existed telegraphic play-by-play reports of baseball games, the use of which was noted by Judge Chase in his opinion in the *Gardella* case, 172 F. 2d 402, 404 (C. A. 2, 1949)[12] We emphasize this point, because the complaint here, and appellant's brief, by constant reference to radio, television and motion picture revenues, attempts to create the impression that boxing differs from baseball and other sports in its dependence on these sources of revenue. It is evident, however, that boxing, like all other sporting events which require no expensive rehearsal and which are the subject of widespread public interest, is and always has been a natural subject for radio, television or motion pictures. Appellant's brief cites (footnote, p. 5) a 1953 heavyweight

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[11]Motion pictures, which necessarily lack the element of suspense as to outcome, are of lesser significance than radio and television both to baseball and boxing and usually involve an edited version of the original, concentrating on the more dramatic bits of action. As to both baseball and boxing, however, the sale of the right to take and distribute motion pictures is a possible source of revenue which is availed of from time to time.

[12]Appellant's brief, footnote p. 19, recognizes the existence of this particular "by product" of baseball but attempts to minimize its significance. It must be recognized, however, that such reports were representative of the most advanced methods of communication in the era of which we are speaking and were as significant then as radio and television broadcasts are now.

championship contest in which gate receipts were less than those from radio, television and motion pictu.e rights. Comparable allegations were made in the *Kowalski* and *Corbett* cases (companion cases to the *Toolson* case before this Court) with respect to All Star game and 1950 World's Series receipts (*Kowalski* complaint pars. 31, 32, Oct. 1953 Term, No. 23; *Corbett* complaint pars. XXI, XXII, Oct. 1953 Term, No. 25).

The analogy between boxing and baseball is such that Congress, not having intended (as this Court stated in the *Toolson* case) to include baseball within the scope of the antitrust laws, cannot logically be said to have had a contrary intent as to boxing. Man to man conflict, which is the essence of modern boxing, antedates baseball by many hundreds of years; indeed, its genealogy may be traced back through the Roman gladiator to the Old Testament story of David and Goliath. John L. Sullivan was the recognized heavyweight champion when the Sherman Act was adopted. Congress, in 1890, must be deemed to have been quite as aware of the existence of boxing as it was of the existence of baseball. There is no rational basis for imputing to Congress an intent to have the words of the Sherman Act exclude baseball while at the same time intending that the same statutory words should include boxing or any other sport.

Every court which has had to consider the question since the *Toolson* case has found that boxing is indistinguishable from baseball. That was the view not only of the Court below, after full presentation of the arguments, but also of the District Court of the United States for the Northern District of Illinois, Eastern Division in *Peller* v. *International Boxing Club et al.*, (Civil No. 52 C 813, 1954) and by the same Court, affirmed by the Court of Appeals, in

Shall v. *Henry*, 211 F. 2d 226 (C. A. 7, 1954). In the *Shall* case, Judge Lindley said (at p. 229):

> "* * * Those decisions [*Federal Baseball* and *Toolson*] must control unless there is some significant legal distinction between the business of promoting and producing boxing bouts at various places in the United States and that of professional baseball.
>
> * * *
>
> We agree that a professional boxing contest is not to be distinguished legally from that of a professional baseball game. Obviously each involves a contest of physical skill and endurance taking place in a particular locality. The success of each depends upon the support of the public in the purchase of tickets and the sale of radio and television rights. Each baseball game is unique; no two are exactly alike. Each boxing contest is unlike any other. The profitable promotion of each depends upon the same elements. Under the mandate of the Supreme Court, therefore, we must hold that it was not the intention of Congress to extend the provisions of the Anti-Trust laws to athletic contests such as those involved in boxing."

Commentators also reflect the opinion that all sports are on a common ground, so far as the antitrust laws are concerned. For example, in (1949) 17 *U. Chi. L. Rev.* 56, at p. 77, it was said "All professional sports, because of the problems common to all, have adopted systems similar to that under which 'organized baseball' operates". See also, (1949) 58 *Yale L. J.* 691 at pp. 702, 703.

Such judicial opinion and comment mirrors the opinion of the legal profession that the law applicable to baseball would be applied, without any question, to all other professional sports. The position of appellant here would

involve a retrospective and logically unfounded diminution of the value of a precedent which, except for doubts expressed in one opinion in the *Gardella* case and proved by the *Toolson* case to be erroneous, has been firm for many years.

II

SINCE THERE IS NO VALID DISTINCTION BETWEEN PROFESSIONAL BASEBALL AND PROFESSIONAL BOXING THE DOCTRINE OF *STARE DECISIS* SHOULD BE APPLIED.

The arguments of the Government, which will be discussed in detail below, attempt to limit the *Federal Baseball* and *Toolson* decisions to their own facts. These arguments do not, however, present any reasons why these cases should be so limited, contrary to the generally accepted principle that judicial pronouncements, especially those of this Court, are to be applied to other situations than the precise one in which the pronouncement was made.[13]

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[13]Members of this Court, on various occasions and in varying contexts, have indicated their awareness that the decisions in a particular case would be applicable to other situations, *e.g.*:

> "As these tax decisions *may have an influence on subsequent decisions beyond the limited area of the issues decided,* I have thought it advisable to state my position for whatever light it may throw * * *" (Mr. Justice Reed in, Comm'r. v. Estate of Church, 335 U. S. 632, 651 (1949) (emphasis supplied).

> "* * * But sometimes *the path that we are beating out by our travel is more important to the future wayfarer* than the place in which we choose to lodge." (Mr. Justice Jackson in, First National Bank v. United Air Lines, 342 U. S. 396, 398 (1952) (emphasis supplied).

> "We are framing here a rule of evidence for criminal trials in the federal courts. That rule must be drawn in light not of the particular case *but of the system which the particular case reflects.* * * *" (Mr. Justice Douglas in, United States v. Carignan, 342 U. S. 36, 47 (1951) (emphasis supplied).

This Court, in *Screws* v. *United States*, 325 U. S. 91 (1945), has recently enunciated the criteria by which a precedent is to be evaluated. The Court said (at p. 112 of 325 U. S.):

> "But beyond that is the problem of *stare decisis*. The construction given § 20 in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent reexamination. The meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 to meet the exigencies of each case coming before us."

The applicability of the foregoing language to this case is immediately apparent. Whether baseball or boxing is within or without the Sherman Act is a question of statutory construction rather than constitutional law; this Court has so recognized in the *Toolson* case, where the basis was Congressional intent. The *Federal Baseball* case was the

product of mature consideration and had the result of settling the law for a period of many years, during which Congress had ample opportunity to act had it been so inclined.

Appellant's first argument urging the inapplicability of the *Toolson* case decision is that "the *Federal Baseball* case held only that baseball was not subject to the Sherman Act. It did not hold * * * that boxing is similarly exempt." (Gov. Br., p. 12.) But the natural implications of a precedent which stood for a generation before it was reaffirmed ought not to be sloughed off so cavalierly. This is especially so when, as here, the case at issue is indistinguishable from the precedent.[14] The extension and growth of case law is dependent upon recognition of the logical implications of prior decisions.[15]

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[14]The rationale of the *Federal Baseball* case, as set forth in the opinion of the Court of Appeals which it affirmed, can, with the change of a very few words, be in terms applied to boxing: "The business in which the appellants were engaged, as we have seen, was the giving of exhibitions of baseball [boxing]. A game of baseball [boxing] is not susceptible of being transferred. The players [contestants], it is true, travel from place to place in interstate commerce, but they are not the game [bout]. Not until they come into contact with their opponents on [in] the baseball field [ring] and the contest opens does the game [bout] come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. The exertions of skill and agility which they witness may excite in them pleasurable emotions, just as might a view of a beautiful picture or a masterly performance of some drama; but the game [bout] effects no exchange of things according to the meaning of 'trade and commerce' as defined above." (269 Fed. 681, at pp. 684, 685).

[15]In *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953), where the facts were not as close to the precedent relied upon as they are in this case, the court, in affirming a judgment that a carpenter employed by an independent contractor had obtained against the owner of the vessel because of the unseaworthiness of the ship or its appliances, said at pages 412-413:

> "We are asked to reverse this judgment by overruling our holding in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. Sieracki,

Appellant next argues (Gov. Br., pp. 12, 13) that "there has been no showing that boxing did in fact rely" on the *Federal Baseball* case to the same, or a comparable, degree as did baseball. This alleged lack of a "showing", with its implication of failure of factual proof, introduces another limiting element into the doctrine of *stare decisis*. This is a rather startling theory; it would seem to ban reliance on precedent except by those who can adduce evidence sufficient to warrant a finding in the nature of an estoppel. Legal argument would then not be confined to precedents, as is now the case, but would in effect involve an appellate court in a trial of the factual justification for the citation of each precedent. Stability in the law would decline and each case would tend to become a legal transient. The most ancient and respected precedents would be the hardest to support

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an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided this over strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seaman. That identical argument is repeated here. We reject it again and adhere to *Sieracki*. We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a 'stevedore'. Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

because of the difficulty of excavating proof of reliance in support of practices long followed. By the same token, recent decisions would be valueless because they would not have had time to acquire the patina of reliance which the Government here contends is prerequisite to citation as precedent. It is unnecessary to labor further the undesirability of hobbling *stare decisis* in this way.

The only authority cited by appellant in support of this argument is *Helvering* v. *Hallock, et al.*, 309 U. S. 106 (1939). But this case does not make reliance the measure of the dignity of precedents. It was mentioned there only to show that fealty to the newest decision was not required by considerations of fairness. It involved a conflict of precedents, with the Court rejecting the taxpayer's assertion that it should consider itself constrained by these latest decisions, which departed somewhat from earlier ones. The Court said (at page 119 of 309 U. S.):

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.
>
> Nor have we in the *St. Louis Trust* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the *Klein* doctrine. We have not before us interests created or maintained in reliance on

> those cases. We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process. But it is a fact that in all the cases before us the settlements were made and the settlors died before the *St. Louis Trust* decisions."

No similar problem exists here. The decision in the *Toolson* case clearly demonstrates that the *Federal Baseball* case meets every test of a valid precedent, and it should be followed here without any special requirement of a novel "showing" as to the extent to which there might have been actual reliance thereon. *Toolson* itself, moreover, indicates that reliance is to be presumed; the Court there noted that baseball had been "* * * *left* for thirty years to develop on the understanding that it was not subject to existing antitrust legislation * * *." *Toolson* v. *New York Yankees,* 346 U. S. 356, 357 (emphasis supplied).[16]

Appellant's following and related argument (Gov. Br., pp. 13, 14), that baseball *in fact* relied on the *Federal Baseball* case while boxing did not, is equally insubstantial. Appellant first states that the development of the

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[16]In *Hollywood Lumber Co.* v. *Love,* 155 Cal 270, 274, 100 Pac. 698, 700 (1909), the highest court of the State of California had occasion to say:

> "The decision in the case of *Williams* v. *Santa Clara Mining Association,* 66 Cal. 200, [5 Pac. 85], was the first one upon the subject after the adoption of the codes. It has probably been generally followed. Attorneys have doubtless advised their clients upon the law there announced, and property rights have been acquired upon the faith of it. * * * For almost a quarter of a century that case has been the leading authority in California upon the interpretation of the statutes now before us. If there were any good reason for a change in the rule with reference to trust-deeds, the legislature has had abundant opportunity for an unequivocal declaration of such change."

"farm system" in baseball shows factually baseball's reliance on the *Federal Baseball* case. This is based on the statement of one witness before the Congressional subcommittee, who was contrasting the present situation in baseball with that existing at the time of the *Federal Baseball* case. This is, however, purely a *"post hoc, ergo propter hoc"* contention. The Report (pp. 44, 45, 62-72) clearly indicates that efforts to establish what is now known as the farm system in baseball occurred as early as 1905 and that the development of the farm system at that time was prevented only by league rules, which were continued in substantially the same form until the depression of the 1930's brought to the minor leagues financial problems which compelled support from the major leagues. Actually, the farm system was not a true "development"[17]; it merely meant a shift in the ownership of already fully developed minor league teams.

In contrast to baseball's alleged reliance on the *Federal Baseball* case, appellant then argues (Gov. Br., p. 14)(1) that boxing "cannot point to any comparable organization which it has created in the past thirty years in reliance on exemption from the Sherman Act"; that (2) "the restrictive practices upon which this suit is based were instituted only five and one-half years ago"; and (3) ends by reiterating the previously noted contention that "there is no evidence that the boxing business has ever relied" upon an authoritative decision of this Court exempting it from the antitrust

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[17]The Report (p. 50) points out that there were "more than 40 minor leagues from 1910-13" as compared with 50 in 1951 (Report p. 50). Thus, the only "development" in baseball has been a slight increase in the number of minor leagues. This development is undoubtedly more attributable to the population increase in the intervening years than to any conscious reliance on the *Federal Baseball* decision.

laws. But for the reasons already stated the doctrine of *stare decisis* makes these contentions irrelevant; that they are also factually erroneous and call for correction points up the twilight zone in which the judiciary would have to move if *stare decisis* were to be limited to those cases in which litigants could establish what amounts to an estoppel against departure from precedent. As to (1) we point out that the Report clearly shows that the organization in baseball, in substantially its present form, existed prior to the *Federal Baseball* case and did not, as appellant implies, develop since that case. In contrast, it is also the fact that boxing has had a tremendous development in popularity during that same period, the basic impetus to which was given by the physical training program of the Army in World War I. Thus the argument that baseball relied, while boxing did not, appears to be based on factual misconceptions. Appellant's argument (2), that appellees' alleged restrictive practices are new, is equally unfounded. Leases on arenas suitable for boxing contests have for many years been a prerequisite to obtaining a license from the appropriate athletic commission to promote matches (See, e.g., N. Y. Unconsol. Laws § 9108(2) (1953), 1920 Session Laws. Ch. 912). Exclusive service contracts have been known for over thirty years in boxing[18] but have perhaps become more common in recent years. The practices alleged in the complaint, like the similar practices challenged in the *Toolson* case, would strongly indicate reliance on the natural implications for all sports of the *Federal Baseball* case. But this Court ought not to need such aids before applying its earlier decisions as logic requires.

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[18] *Madison Square Garden* v. *Carnera*, 52 F. 2d 47 (C. A. 2, 1931); *Madison Square Garden* v. *Braddock*, 19 F. Supp. 392 (1937); *Reisler* v. *Dempsey*, 173 N. Y. Supp. 212 (Sup. Ct., N. Y. Co. 1918, not officially reported).

Appellant then argues (Gov. Br., pp. 14, 15) that Congress gave extensive consideration in 1951 to "whether baseball should be exempt from the antitrust laws," but gave no consideration to whether boxing should be so exempted. Appellant's brief (p. 15) shows, however, that the bills which prompted the consideration covered "organized professional sports enterprises" and were not limited to baseball. The Report itself gives the basic reasons which led the Committee to lay the emphasis of its consideration of these bills on an investigation of baseball.[19] Other reasons suggest themselves or are also indicated (See Report, pp. 7-12)—for example, baseball is the "national pastime", is regarded of sufficient importance so that the presence of the President of the United States is required to inaugurate each major league season, and is, from the point of view of participants, spectators, receipts and national newspaper coverage by far the most important professional sport. The Committee hearings, moreover, show that they were not limited to baseball; both professional hockey and professional basketball received attention (Congressional Hearings, Organized Baseball, pp. 1454, 1504-5). The Congressional refusal to act cannot fairly be regarded as reflecting an intention to continue an immunity for baseball but to end it for other sports.

Other aspects of appellant's argument contrasting baseball and boxing can be disposed of more briefly. The statement for example (Gov. Br., p. 16) that "Championship boxing * * * is conducted on a match to match basis" in effect points up the fact that boxing does not require the planned regular interstate movement of teams and person-

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[19]The Report (pp. 2-3) points out that the bills were introduced by friends of baseball who were concerned by the existence of private lawsuits challenging the structure of baseball under the antitrust laws.

nel which is involved in baseball. This distinction only serves to emphasize that *Federal Baseball* is *a fortiori* when applied to boxing.

Appellant also contrasts (Gov. Br., p. 17) the extensive dislocation of baseball which would be caused by application of the antitrust laws to it, compared with the fact that all this suit seeks to accomplish is "to restore the competitive situation as it existed prior to 1949". While this contrast assumes, without basis in the record or other citation, that the pre-1949 situation was different from that now alleged, it nevertheless seems unlikely that the propriety of the application of the antitrust laws should depend upon such dubious imponderables as the degree of inconvenience which their application will entail. It had not been supposed before that a defendant who could show potential dislocation might be regarded as exempt while one, in a similar case, who could not establish equivalent hardship, should be deemed to be embraced.

We have already pointed out (*supra*, pp. 9-10) that with respect to radio, television and motion pictures, boxing and baseball are in the same position, except that baseball's revenues from these sources are approximately ten times those of championship boxing.[20] The allegation of the complaint (R. 12) that revenues from these sources are on "an ascending curve" has its counterpart in the Report (p. 6) which characterizes radio and television as the "fastest growing source of revenue" for baseball.

In the *Toolson* and its companion cases, the appellants argued at length and devoted many pages in their briefs to

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[20]This is based on a comparison of the figures as to boxing for 33 months given in the complaint (R. 5, 12) with those set forth for baseball for 1950 and 1951 at page 6 of the Report and on prorating the result over the 33 month period.

the propositions (a) that radio and television make baseball interstate commerce and (b) that organized baseball had a monopoly of or imposed illegal restraints upon broadcasting and televising baseball games.[21] Appellant makes substantially the same arguments here. There is, however, no difference in kind between the two sports in this respect; indeed, the only difference is one of degree, in that baseball involves considerably larger sums.

Boxing, like baseball, sells, either to a broadcaster or a sponsor, the right to come in and broadcast the event, by radio or television. Such activities do not put the promoter in the radio, television or motion picture business, any more than the sale of similar rights by a college puts the college in such business.

Appellant's final argument concedes (Gov. Br., p. 22) that a promoter has a monopoly, by right of ownership, of the particular contest he is promoting, but goes on to claim, in effect, that since appellees allegedly control all championship boxing contests, their consequent control of broadcast and motion picture rights thereto somehow adds up to monoply or restraint of the broadcasting, television and motion picture industries, even though such rights are sold, if at all, on a contest-by-contest basis. But it would require some special legerdemain to make the whole add up to more than the sum of its parts. Since for reasons already fully covered, the promotion and exhibition of boxing contests was not intended by Congress to be within the antitrust laws, the sale of radio, television and other rights incidental to the promotion and exhibition of such contests cannot be viewed as reversing that intent for boxing any more than for baseball.

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[21]See, e.g. *Toolson* case; *Petition for Certiorari* and *Brief in Support Thereof*—pp. 2, 4, 5, 6, 7, 12, 18, 22, 23; *Petitioner's Opening Brief on Writ of Certiorari*—pp. 4, 6, 7, 8, 9, 12, 24, 25, 38, 39, 40, 41, 42.

The argument of the New York State Athletic Commission as *amicus curiae* is in effect, a plea for Federal regulation of boxing and, as such, would be more appropriately addressed to Congress than to this Court. In this connection, however, we may note that the Report considered and rejected the idea of similar regulation of baseball. (Report, pp. 230, 231).

In the *Toolson* case, this Court had to choose between preserving the vitality of the doctrine of *stare decisis* in an important field of statutory construction and applying the Sherman Act to a business in which a large part of the American people have a considerable and continuing interest. This Court chose to adhere to *stare decisis,* even to the extent of expressly refusing to re-examine the Sherman Act questions involved. The choice here is not nearly so open and it should be the same. As we have shown, *Federal Baseball* applies to boxing as an *a fortiori* precedent; by the same token, the *Toolson* case is likewise an *a fortiori* precedent here. By reason of fewer interstate contacts and far less public interest and involvement, a decision for the appellant here, after the Court's deliberate choice in *Toolson,* would deal a greater blow to *stare decisis* than would have been the case in *Toolson,* because the countervailing Sherman Act policy considerations cannot be nearly as important in boxing as in baseball.

Conclusion

The judgment of the District Court dismissing the complaint should be affirmed.

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No. 53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA,
Appellant,

vs.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., INTERNATIONAL BOXING CLUB, MADISON SQUARE GARDEN CORPORATION, JAMES D. NORRIS and ARTHUR M. WERTZ.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE STATE OF NEW YORK AND THE NEW YORK STATE ATHLETIC COMMISSION, AS AMICUS CURIAE

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OCTOBER TERM, 1954

UNITED STATES OF AMERICA, *Appellant,* *vs.* INTERNATIONAL BOXING CLUB OF NEW YORK, INC., INTERNATIONAL BOXING CLUB, MADISON SQUARE GARDEN CORPORATION, JAMES D. NORRIS and ARTHUR M. WERTZ.	No. 53

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE STATE OF NEW YORK AND THE NEW YORK STATE ATHLETIC COMMISSION, AS AMICUS CURIAE

Introduction

The Amicus Curiae herein is a duly constituted administrative agency of the State of New York; a division of that State's Department of State and its organic law, (Laws of New York; Chapter 912 of the Laws of 1920, as amended), entrusted the entire field of professional boxing and wrestling to a Commission with powers to license, to make all rules and regulations necessary to the best interests and proper conduct of these sports, and to completely administer and control every facet of such boxing and wrestling.

The facts in the instant case have been fully and clearly set forth in the Brief for the United States and we will not burden the Court with their repetition. Similarly, we are content with and adopt the noting of jurisdiction, and the review of all prior proceedings in the case therein related. We take no position as to whether the monopoly charges levelled against the appellees by the Government can or should be sustained.

The Contentions of the Amicus

The New York State Athletic Commission argues solely that boxing in its important aspects, which manifestly includes the promotion and exhibition of professional championship boxing contests, should not be excluded from the scope of federal antitrust statutes. To grant such a judicial exemption would leave highly integrated commercial enterprises subject to no binding uniform control and operating without possibility of effective overall regulation in a chaos of competing and overlapping state dominions. In short, realistically viewed, such boxing promotions have been and can be so unlocalized as to make federal regulation not only legally appropriate but urgently required.

POINT I

THE PROMOTION AND EXHIBITION OF CHAMPIONSHIP BOXING CONTESTS SHOULD BE SUBJECT TO FEDERAL ANTITRUST LEGISLATION.

The complaint herein was dismissed by the District Court on the authority of *Toolson* v. *New York Yankees*, 346 U. S. 536. The limitations of that decision and its manifest confinement solely to baseball have been exten-

sively outlined by the Government. We can add nothing to those arguments except to conclude, in consonance with the appellant, that this Court's decisions in the baseball cases do not require, under the doctrine of Stare Decisis, a holding that the promotion of championship boxing contests, as they are presently conducted, are not interstate commerce within the Sherman Act.

Today, television, not the box office, is the tail that swings the boxing kite. It brings the bout, and surely any championship contest, to an audience of millions throughout the country thus dwarfing the paid admissions at the arena.

The sale of television, radio and motion picture rights in and to these contests provides by far the greatest portion of boxing revenues, to the promoter, the fighters and to the States which tax the gross receipts of these contests, revenue which States are anxious to protect and eager to augment. But most important, television has made the place of promotion a far less important consideration to the promoter with the consequent result that in arranging for a title match, or maintaining and operating a business of boxing championship promotions, such entrepreneur may now "shop around" for the jurisdiction whose regulatory agency or the lack of one, makes the promotion the least supervised or the cheapest. There is little, if any, binding uniformity in the regulations of the several States on questions of monopoly, standards of licensing and tax rates, and State policy on these issues in many jurisdictions is often incomplete or wholly unexpressed.

Some progress has been made by informal compact but in the main no one State agency has the power or jurisdiction to control boxing in any comprehensive fashion. It is essentially a transient industry; with suitable arenas

in most of the important cities. Moreover, boxers and managers, and the contracts which they execute, can be licensed and registered in whichever State or States they may find acceptance.

Thus, if the allegedly monopolistic practices outlined in the complaint (R5-8) were outlawed in New York, and the license of the promoting corporation accordingly suspended or revoked, the appellees have dozens of other jurisdictions in which these same practices may not be considered any obstacle to the sanctioning of a lucrative championship contest. Nevertheless, television enables the promoter to capture the huge New York audience who may see and hear a championship fight that its Commission, on public policy grounds, would not sanction for a New York arena. It is apparent therefore that the interstate aspects affecting the control of boxing are so crucial as to eliminate effective local supervision.

The instant case serves amply as a concrete example. If, as the complaint herein alleges, the professional services of boxing champions and contenders in the important weight classes have been reserved exclusively for the benefit of a single promoter or for a group of affiliated promoting parties who also control outstanding sports arenas in leading cities, then the transient system of licensing among the several States renders wholly illustory any single local Commission's power to safeguard the best interests of boxing from a potential monopoly.

States cannot band together to legally control boxing without surrendering sovereignty or obtaining the approval of Congress. Yet many boxing problems, such as health and safety regulations, can be adequately treated on a local basis because their interstate ramifications are not so extensive or elusive. So far as we know, New York is the only

state that has formally questioned the validity of the alleged monopolistic practices herein cited by the United States. New York's limited jurisdiction and power in the premises can not even approach that of the District Court in the event the federal antitrust laws are applicable and the charges are sustained.

But if the holding of inapplicability perseveres, the New York Commission cannot realistically wholly solve this problem which is national in scope and may well involve competing and overlapping state authorities enforcing different public policies. While the subjection of promoting corporations to these federal statutes will not bring all the needed uniformity into boxing regulation, it will nevertheless serve mightily to harness complex interstate commercial enterprises which have the power to at least unwittingly threaten free enterprise in the sport.

THE JUDGMENT OF THE DISTRICT COURT WAS INCORRECT AND SHOULD BE REVERSED.

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